91-771

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GENE MEYERS, NORMAN WYCHE, ALDO EBERLE, AND DONALD NORTHCUTT,
Plaintiffs-Petitioners,

v.

IDEAL BASIC INDUSTRIES, INC.,
Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. In the instant malicious prosecution case, was there *any* record evidence to prove that the Defendant/Respondent, Ideal Basic Industries, Inc. (Ideal), commenced the underlying litigation against the Plaintiffs/Petitioners in "bad faith" and, if such evidence was adduced at trial, was the defense of "good faith" reliance on the advice of counsel a question of fact for the jury?

2. In the instant case, did the Trial and Appellate Court err in concluding that "Ideal did not know anything about these Plaintiffs/Petitioners that would have alerted them to a concern as to the propriety of their attorneys advice" to commence an action against the four Plaintiffs/Petitioners charging them with conspiracy to file false and fraudulent Industrial Court claims, to commit extortion, to commit sabotage, and to violate the Anti-Racketeering laws of the United States?

3. Did the Trial and Appellate Court err in setting aside a jury verdict in favor of the Plaintiffs/Petitioners for $14,000,000.00 on the basis that there was no evidence to support the jury's specific finding that the Defendant/Respondent had *not* relied in good faith on the advice of counsel?

4. Were the damages awarded to the Petitioners excessive?

5. If such damages were excessive but there is sufficient evidence to support the jury's verdict on liability, should the Petitioners be offered a remittitur and a new trial ordered on damages *only* in the event the Petitioners refuse to accept the remittitur?

6. Did the Trial Court abuse its discretion by conditionally granting a new trial on all issues, including the issue of liability?

7. Did the Plaintiffs/Petitioners state a claim for abuse of process when they alleged that unfounded allegations were asserted against them "for ulterior and unlawful purposes"?

8. With respect to the abuse of process claim, was there a requirement that Plaintiffs/Petitioners allege and show some definite act or threat by Ideal not authorized by the process?

PARTIES

All of the parties to this Petition for Writ are identified in the style and caption of the case:

GENE MEYERS, NORMAN WYCHE,
ALDO EBERLE, and DONALD NORTHCUTT,
Plaintiffs-Petitioners,

v.

IDEAL BASIC INDUSTRIES, INC.,
Defendant-Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Gene Meyers (Meyers), Norman Wyche (Wyche), Aldo Eberle (Eberle) and Donald Northcutt (Northcutt), Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on August 6, 1991.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit, Case No. 90-7009, rendered on August 6, 1991, was designated as a published Opinion. However, Petitioners do not, at this time, have a citation for that Opinion. A copy is attached as Appendix "A" in the Appendix, pages 1a-13a.

It should also be noted that Petitioners have filed a Motion for Rehearing En Banc with respect to the referenced Opinion. Petitioners understand that such Motion is *not* a tolling Motion for purposes of filing a Petition for Writ of Cert. Reference is made to the motion for information purposes only.

The opinion and final judgment of the District Court for the Eastern District of Oklahoma, sustaining Ideal's Motion for Judgment Notwithstanding a $15,000,000.00 jury verdict in favor of the Plaintiffs/Petitioners, filed of record in the District Court case on the 30th day of January, 1990, are unreported and are attached as Appendix "B" in the Appendix pages 14a-23a and Appendix "C" page 24a.

STATEMENT OF JURISDICTION

This case was originally filed in the United States District Court for the Western District of Oklahoma under 28 U.S.C. 1332. The Plaintiffs/Petitioners, Meyers, Wyche, Eberle, and Northcutt were all residents and citizens of the State of Oklahoma and the Defendant/Petitioner, Ideal, was a foreign corporation with its principal place of business located in Denver, Colorado.

The Petitioners, Meyers, Wyche, Eberle, and Northcutt seek a Writ of Certiorari from this Court to the United States Court of Appeals for the Tenth Circuit on an Order rendered by that Court on the 6th day of August, 1991, under 28 U.S.C. 1254(a).

RELEVANT CONSTITUTIONAL OR STATUTORY PROVISIONS

1. Rule 50 of the Federal Rules of Civil Procedure:

> Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict
>
> (a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent to the jury.
>
> (b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned

such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. (Amended July 1, 1963; Aug. 1, 1987.)

2. 7th Amendment to the United States Constitution:

AMENDMENT 7

Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

3. 28 U.S.C. 1291:

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

(June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951, ch 655, § 48, 65 Stat. 726; July 7, 1958, P. L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, P. L. 97-164, Title I, Part A, § 124, 96 Stat. 36.)

STATEMENT OF THE CASE

The instant case involved the Petitioners' prosecution of a malicious prosecution claim against Ideal for Ideal's initial and unfounded prosecution of an underlying claim against the Petitioners for criminal conspiracy to file false and fraudulent Workers Compensation Claims and commit sabotage. The malicious prosecution case was tried to a jury and, as previously indicated, the jury returned a verdict in favor the Petitioners for $15,000,000.00.

Before summarizing the factual history of this case, Petitioners would first describe for this Court the procedural history of this case.

In April of 1988, Ideal Basic Industries, Inc. (Ideal) commenced an action against four of its employees, Norman Wyche, Gene Myers, Don Northcutt and Otto T. Eberle Jr. (These employees shall hereinafter be referred to as "Petitioners"). The Complaint further named as Defendants the Local 114 of the Cement, Lime, Gypsum and Allied Workers, Division of the International Brotherhood of Boilermakers Iron Ship Builders, Blacksmiths, Loggers and Helpers. The Complaint accused the Petitioners and other Defendants of a conspiracy to file nonmeritorious, false, and fraudulent workers compensation claims against Ideal, to commit sabotage, to extort union concessions, to extort money and benefits from Ideal by way of false representations.

The Complaint, a copy of which is designated as Appendix D, pages 25a-33a, contained four Counts, Count I, styled as a RICO Count, accused the Petitioners of "engaging in a pattern of racketeering activity through having devised a scheme to defraud and obtain money by false and fradulent

pretenses and representations . . . ''

In paragraph (12) found in Count I of the Complaint, Ideal accused the Petitioners of engaging in sabotage or conspiracy to commit sabotage for the purpose of affecting interstate commerce in violation of 18 U.S.C. 1951 (The Hobbs Act).

Paragraph (13) found in Count I accused the Petitioners of extortion in violation of the Hobbs Act.

Paragraph (14) found in Count I accused the Petitioners of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. 1961.

The remaining paragraphs of Count I accused the Petitioners of violations of 18 U.S.C. 1961 and 18 U.S.C. 1962 (b) (c) and (d).

Count II entitled ''conspiracy'' accused the Petitioners of the ''statutory crime of conspiracy'' against Ideal by conspiring to file false claims in the Industrial Court in violation of 21 Okla.Stat. 421; 76 Okla.Stat. 1 and 2.

Count III, entitled Deceit accused the Petitioners of the statutory tort of deceit for filing false Industrial Court claims in violation of 76 Okla.Stat. 1 and 2.

Count IV accused the Petitioners of abuse of process in the filing of false claims.

Ideal prayed for compensatory damages of $250,000.00, treble damages of $1,000,000.00 and punitive damages in the amount of $25,000.00 against each Petitioner.

In September of 1988, Ideal amended its Complaint for the sole purpose of naming as additional Defendants The

International Brotherhood of Boilermakers, Iron Ship Builders, Black-Smiths, Loggers, and Helpers, and George Fields.

As will be demonstrated in greater detail herein, there was literally *no* evidence to support these outrageous allegations of criminal conspiracy. Ideal's Complaint was eventually dismissed by Ideal with the stipulation that such dismissal was a resolution of the case in favor of the Petitioners — thus establishing the requisite predicate for the Petitioners' new action against Ideal for malicious prosecution and abuse of process.

Prior to the trial of Petitioners' action against Ideal, the Court dismissed Petitioners' abuse of process count. The Court's Order was entered on August 3, 1989. A copy of the Order is attached as Appendix E pages 34a - 38a. Petitioners appealed that ruling to the 10th Circuit and the 10th Circuit affirmed the Dismissal. Petitioners are now seeking a review of both decisions.

The malicious prosecution claim was tried to a jury. On August 11, 1989, at the conclusion of trial, the Jury returned a verdict that contained three (3) separate forms. On form (1), the Jury found in favor of the Petitioners on the issue of whether or not Ideal had "probable cause" to commence the underlying action *and* on the issue of whether or not Ideal relied in *good faith* on the advice of counsel to bring the underlying action.

On form #2, the Jury awarded actual damages as follows:

(a) Norman Wyche — $2,000,000.00

(b) Gene Meyers — $2,000,000.00

(c) Don Northcutt — $1,500,000.00
(d) Otto Eberle — $1,500,000.00

On form #3, the Jury awarded the Petitioners collectively $8,000,000.00 in punitive damages.

The Court, upon Motion of Ideal, reduced the punitive damages award to $7,000,000.00 pursuant to 23 Okla.Stat. 9.

Ideal also filed Motions for Judgment Notwithstanding the Verdict and for New Trial. On January 30, 1990, the Trial Court granted Ideal's Motion for Judgment Notwithstanding the Verdict. The Court concluded that there was *no evidence* to support the *Jury's conclusion that Ideal had not* relied in good faith on the advice of counsel. Petitioners appealed that ruling to the 10th Circuit Court of Appeals which affirmed the Trial Court. Petitioners now seek a review of the 10th Circuit's decision.

The factual history of the case can be summarized as follows:

Ideal is a cement manufacturer with facilities located throughout the United States. In early 1988, Ideal installed Gary Sauer (Sauer) as its new plant manager at the facility in Ada, Oklahoma. Sauer came to Oklahoma with the preconceived belief that all Industrial Court claims for lung damage were false or fraudulent and that action should be taken to stop the claims.

Prior to Sauer's coming to Oklahoma, Ideal had already adopted punitive and oppressive measures to coerce and intimidate employees into abandoning lawful Industrial Court claims. All four Petitioners testified that anyone who filed

a lung claim, including the four Petitioners, were required to wear masks. However, the requirement to wear such masks extended to areas *not* exposed to cement dust e.g. air-conditioned vehicles, offices and warehouses containing no cement dust.

The testimony revealed that the masks were cumbersome and difficult to breathe through. The Petitioner Gene Meyers testified that he almost lost consciousness on one particular occasion as a result of the oppressive requirement to wear the mask at all times. Only those employees who had filed claims were required to wear the masks.

In addition to taking action to stop Industrial Court claims, Sauer took it upon himself to resolve the problem of apparent sabotage or vandalism with respect to Ideal's property. In furtherance of these goals, Sauer commenced an investigation. Sauer interviewed certain corporate officials and personnel. Sauer, in the course of his Trial testimony, testified about the following investigation and information available to him:

(a) Conversations with a Mr. Vandenburg, the industrial relations manager, and Mr. Beckford, the Workers Compensation Attorney, relative to the status of Workers Compensation claims.

(b) Conversation with Mr. Northcutt, one of the four employees named as a Defendant in the underlying action and as a Petitioner in this matter.

(c) Conversation with Mr. Cristelli.

(d) Conversations with Messers Vandenburg, Harrison and Haley relative to the alleged out of court statement of Dr. Welborne relative to the Industrial Court

claims of two of the four Petitioners in the instant case.

Ideals attorney reduced to written form statements from the employees referenced above and others. Sauer testified that he was aware of and had reviewed those statements prior to the commencement of suit.

(e) Sauer had access to the Industrial Court records and all related medical records with respect to the twelve (12) claims filed by the four Petitioners in the instant case. Those records revealed the following:

That these four Petitioners had prevailed on ten out of twelve claims.

That the claims of these Petitioners were not filed at the same time. Wyche sustained a back injury in December of 1987, consulted an attorney, was examined by a physician, filed three claims for back, lung and hearing injuries in late 1987 and won all three claims.

Northcutt filed a back claim in 1983 and lung and hearing claims three years later. He won all three claims.

Meyers sustained a shoulder injury in 1985 and filed claims in 1985 for shoulder, lung and hearing injuries. He won all but the lung claim.

Eberle filed claims for lung and hearing in August of 1987. In October of 1987, he fell and hurt his back and claims were subsequently filed in the fall of 1987 for the shoulder and back injuries. Eberle actually filed four claims i.e. hearing, breathing, right shoulder, back and left shoulder. He was compensated on all claims with the exception of the lung claim.

That the Petitioner Gene Meyers had three (3) separate and independent medical reports from three (3)

separate physicians advising him that he had sustained lung damage as a result of his employment with Ideal.

That all four Petitioners had been exposed to thirty-nine (39) different types of cement dust.

Wyche testified about his exposure to six or eight different kinds of kiln brick which had achronium in them; welding fumes; silt dust; limestone dust; shale dust; soda ash; coal dust; cement dust; clinker dust.

Northcutt testified about his exposure to dust. Northcutt testified about hospitalization in 1977 for "dust pneumonia".

Meyers testified with respect to his dust exposure and about his work in a "coal mill". As a result of his exposure to coal dust, Meyers was required to use Comet to remove the dust from his skin.

Eberle testified about coughing up mucus. He also testified about his x-rays which reflected spots on his lungs.

Ideal had defended none of the Petitioners' Industrial Court claims on the basis of fraud.

(f) Sauer had access to records revealing that employees throughout the company had prevailed on 21 out of 26 claims.

(g) Sauer discussed the filing of claims with the plant manager of Blue Circle, another cement company located in Tulsa, Oklahoma.

(h) Sauer was advised pre-suit by the Deputy Sheriff who was in charge of the criminal investigation with respect to "vandalism/sabotage" that:

1. he had been unable to determine whether or not

the property damage had resulted from vandalism or sabotage

2. that there was no evidence linking Petitioners or anyone else to "vandalism/sabotage".

(i) Sauer talked to the Petitioners' supervisors about their job histories.

In addition to Sauer's investigation, Ideal was charged with knowledge of the following:

(a) One of the Petitioners, Norman Wyche, had, on two separate occasions, warned Ideal about an event of sabotage and had assisted in repairing a torn conveyor belt *before* it caused substantial damage.

(b) All four Petitioners had worked around heavy and loud equipment and machinery — thus substantiating the loss of hearing claim.

(c) All four Petitioners had worked for the company for a collective time period of over 75 years and had histories of excellent and loyal service to Ideal.

The facts recited above constituted the body of knowledge that Ideal had relative to these Petitioners before commencing the underlying action against them.

After marshalling these facts, Ideal, in April of 1988, filed a Complaint in the United States District Court for the Eastern District of Oklahoma against the Petitioners and accused them of conspiracy to file false workers compensation claims, commit sabotage, extort union concessions and violate the anti-racketeering laws of the United States.

The filing of that action had a devastating impact emotionally, physically and economically on the lives of these

four Petitioners. All four lost their jobs with Ideal. One of the four is retired. The other three all testified with respect to their inability to find additional work as a result of the allegations of criminal activity.

After inflicting the damage indicated on these Petitioners, Ideal then dismissed the claims. The Petitioners then filed the instant case for malicious prosecution and abuse of process.

As previously indicated, the Petitioners claim for abuse of process was dismissed prior to trial. The malicious prosecution claim was tried to the jury and the jury concluded that Ideal did *not* have probable cause to commence the underlying action and had *not* relied in good faith on the advice of counsel. The jury awarded these Petitioners $7,000,000.00 in actual damages and $8,000,000.00 in punitive damages.

The Trial Court granted Ideal's Motion for Judgment NOV on the basis that there was *no* evidence to support the Jury's conclusion that Ideal had not acted in good faith reliance on the advice of counsel. The Trial Court further conditionally ordered a new trial on the grounds that the damages were excessive.

The 10th Circuit Court of Appeals affirmed the Trial Court's ruling with respect to the Judgment NOV. As a result, the conditional Order for new trial was not addressed.

GROUNDS FOR GRANT OF THE WRIT OF CERTIORARI

1. The decisions of the Trial Court and the 10th Circuit are in direct conflict with the decisions of the United States

Supreme Court defining the parameters and circumstances under which judgments notwithstanding the verdict may be granted. The net effect of these decisions was and is to deprive these Petitioners of their fundamental Constitutional right to a jury trial provided by the Seventh (7th) Amendment to the Constitution.

2. The decisions of the Trial Court and the 10th Circuit Court of Appeals totally ignore and are in direct conflict with fundamental principles of the common law and the Oklahoma law of malicious prosecution.

As a result, and as a result of the error specified in #1 above, the decisions of the Trial Court and the Court of Appeals represent a departure from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

3. While the Court of Appeals did not specifically deal with the issue of the Trial Court's conditional grant of new trial, the Trial Court's ruling in that regard was an abuse of discretion *and* in conflict with the rulings of the 10th Circuit Court of Appeals and other Circuit Court of Appeals concerning the subject of new trial Motions based on the Trial Court's perception that damages are excessive.

ARGUMENT

If the Appellate Court decision is permitted to stand, the right to seek redress for malicious prosecution of unfounded claims will be effectively removed from the common law. Parties will be permitted to conspire with their counsel and to launch unfounded and malicious claims, for collateral and unlawful purposes with impunity. All that is required

to insulate a party from a malicious prosecution claim is for that party to state — "my lawyer said I had a case". This simplistic definition of the defense of reliance on the advice of counsel is untenable and unsupported by the wealth of cases and treatises on the subject.

It should be pointed out from the beginning that the defense of good faith reliance on the advice of counsel is an affirmative defense. Ideal had the burden of proving the elements of this defense, to-wit:

1. the reliance must be in *good faith*;

2. the good faith reliance must be preceded by a full, complete and truthful disclosure of all known and relevant facts to the attorney.

Miller v. Bourne, 256 P.2d 431 (Okla. 1953).

As argued herein, Ideal failed to meet this burden — or, at the very least, there was sufficient evidence adduced at trial to support the jury's conclusion that Ideal had failed to meet its burden.

Proposition One: The 10th Circuit Court Of Appeals Erred In Affirming The Trial Court's Judgment Notwithstanding The Verdict.

The standard for granting a judgment notwithstanding the verdict may be summarized as follows:

> "Jury verdicts are *not* to be lightly overturned as courts recognize that a 'traditional sanctity' attaches to the solemn verdict of a jury. Judgment NOV is proper only when the evidence so strongly supports an issue that reasonable minds could not differ. In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party. The court

> cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury. *Ware v. United School Dist. No. 492,* 881 F.2d 906, 911 (10th Cir. 1989). (Emphasis added).

Under Rule 50(a), the trial court must direct a verdict if, under governing law, there can be but *one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, the verdict should not be directed. Anderson v. Liberty Lobby Inc.,* 477 U.S. 242 (1986); 91 L.Ed. 202; 106 S.Ct. 2505 (Emphasis added).

Clearly, judgments notwithstanding the verdict are *not* favored in the law. As applied to the instant case, Ideal's defense, the basis of the Trial Court's decision granting judgment N.O.V., and the 10th Circuit's decision affirming the Trial Court was that Ideal had acted in good faith reliance on the advice of counsel to commence the underlying action.

However, with respect to the defense of good faith reliance, the Oklahoma Supreme Court has provided in *Miller v. Bourne,* 256 P.2d 431 (Okla. 1953):

> ". . . if there is *any* evidence reasonably tending to prove that prosecutor instigated the proceedings with view of gaining some private advantage, or did not give attorney full and fair statement of all material facts, *then case should be submitted to the jury.*" (Emphasis added).

In the instant case, both the Trial Court and the 10th Circuit concluded that there was no evidence indicating that Ideal acted in bad faith.

The entire premise of the Court of Appeal's decision can be found at page (13) in the last sentence of the first paragraph:

"Ideal did not know anything about these Appellants (Petitioners) that would have alerted them to a concern as to the propriety of Mr. Kruger's recommendation."

This single finding, which is the foundation for the Court's opinion, ignores the substantial record evidence to the contrary. More importantly, it is a finding which reflects the Appellate Court's own attempt to weigh the evidence — which it is specifically prohibited from doing by this Court and hundreds of other Appellate Court decisions dealing with the subject of Judgments Notwithstanding the Verdict.

The jury in the instant case did not consider the issue of good or bad faith reliance on the advice of counsel in a vacuum. The jury considered all of the relevant facts and circumstances surrounding Ideal's decision to sue the Petitioners for criminal conspiracy:

1. The knowledge that Ideal possessed with respect to these Petitioners.

This body of knowledge was described in detail in the Statement of the Case.

In summary:

— the Petitioners had filed twelve Industrial Court Claims and had prevailed on all but two of those claims

— the claims were filed on the advice of counsel and with supporting medical data and testimony

— the claims were not filed during the same time period

— none of the claims had been defended on the grounds of fraud

— the plant manager was advised by the Deputy Sheriff

that there was *no* evidence implicating the Petitioners or anyone in acts of "sabotage/vandalism"

— one of the Petitioners had acted to warn Ideal about an event of sabotage and as a result, saved Ideal substantial sums of money.

It is ludicrous to contend that this data would not have put Ideal on notice that their attorney's advice to sue these Petitioners for conspiracy to file *false* and *fraudulent* Industrial Court Claims *and* to commit sabotage was improper.

Again, it was not and is not the role of the Appellate Court to substitute its judgment for that of the jury. The question is whether or not this evidence, viewed in a light most favorable to the Petitioners, warrants a conclusion that Ideal had not acted in good faith — or that "reasonable minds" could differ with respect to the conclusion to be drawn.

2. No evidence to support Ideal's claims of criminal conspiracy.

In addition to the evidence which clearly mitigated against a criminal conspiracy claim, the record is devoid of any evidence to the contrary. There is evidence in the record to reflect that Ideal and its attorney conducted an investigation. There is also evidence in the record to reflect that Ideal and its attorney discussed the sum and substance of their investigation. What is blatantly absent from the evidence is any indication of specific facts marshalled by either Ideal or its attorney which would have supported the criminal conspiracy claims against the Plaintiffs. In fact, *Ideal's attorney testified that he had no evidence indicating that these four*

Petitioners had committed acts of sabotage and that he had never advised Ideal to the contrary.

Ideal has argued that its attorney conducted an investigation and that Ideal never knew the results of that investigation. To begin with, the record does not support such a conclusion. However, even if that were true, there is no record evidence to reflect that Ideal attempted to discern the factual basis for claims of criminal conspiracy. Even if Ideal were as truly ignorant as it would have the jury and Court believe, the failure to inquire into or establish the factual basis for criminal conspiracy claims was evidence, in and of itself, of bad faith.

3. The record reflects that Ideal did not make either a complete or truthful disclosure of all facts to its attorneys.

In *Bertero v. National General Corporation,* 529 P.2d 608 (Cal.)(1974), the Court provided at page 617 the following discussion:

> "It also appears that the defendants failed to establish that they informed counsel of specific relevant facts prior to the filing of the cross-application. Although Klein and counsel testified that all defendants books and records had been made available, this testimony *fails to meet the burden that counsel must be provided with specific facts and not merely unleashed on a hunting expedition.*" (Emphasis added).

The record in the instant case is void with respect to specific disclosures — with the single exception of the testimony that Kruger was given free access to the plant and its people ie. *"unleashed on a hunting expedition".*

Moreover, there is evidence in the record to reflect that the attorney was not given a full disclosure. On cross-examination, Kruger's testimony revealed the following:

1. He was not told the job description for each Petitioner. Clearly the nature of the Petitioner's job was a material factor to be considered in determining whether or not false Industrial Court claims had been filed.

2. He was not advised about the equipment these Petitioners worked around. This fact had a direct bearing on the issue of hearing loss claims.

3. He was never advised about Mr. Meyers' exposure to coal dust. While Mr. Meyers lost his lung claim, his exposure to such dust was relevant to the issue of whether or not he had filed a fraudulent claim.

4. He was not advised about Mr. Meyers' involvement or lack of involvement in the union.

5. He was not told about the personal relationship between these Petitioners.

There is also evidence in the record to show that Ideal did not make a truthful disclosure to its attorneys.

Tom Quaid, a company official, testified at trial that he signed and delivered to Mr. Kruger pre-suit a written statement which stated that the Petitioner, *Ted Eberle told him that he needed to file a Workers Compensation on his back.*

At trial, Mr. Quaid stated:

"I don't think that Ted Eberle told me in those exact words. I know I looked at the deposition. *I know thats*

what I signed, but in my opinion thats what he was getting at, *but he never did use those exact words.*"

At page 490 of the TR, Mr. Quaid recalled the deposition taken *"post-suit"* at which time, on page 7, line 20, Mr. Quaid admitted that Mr. Eberle had never *suggested* that a claim be filed.

At page 9 of the deposition, line 3, Mr. Quaid was asked "Did Mr. Eberle tell you to file a Worker's Compensation Claim?" Mr. Quaid's answer was *"no"*.

On the same page, line 9, he was asked if Mr. Eberle ever suggested that he ought to file a claim. Mr. Quaid responded "He *never* said *anything* about me filing it. He only *asked me if I was going to.*"

Pre-suit, Mr. Quaid said to Mr. Kruger "Mr. Eberle *told* me that I *needed* to file a claim."

Post-suit, either by deposition or at the time of trial, Mr. Quaid unequivocally stated:

"(1) he didn't *use* those exact words

(2) he *never* did use those exact words

(3) he never *told* me to file a claim

(4) he *never suggested* that I file a claim

(5) he *never* said *anything* about me filing a claim

(6) he only *asked* me if I was going to [file a claim]."

Mr. Quaid totally and unequivocally recanted his pre-suit statement to counsel. This evidence establishes the false pre-suit disclosure of material facts to counsel.

4. Ideal's blatant hostility to the filing of Industrial Court claims coupled with oppressive, harassing, and puni-

tive measures taken against Industrial Court Claimants.

The jury viewed

a) Ideal's knowledge with respect to these Petitioners, which knowledge was inconsistent with allegations of criminal conspiracy;

b) the complete void of evidence to support claims of criminal conspiracy; and

c) Ideal's blatant hostility toward Industrial Court claims and its oppressive and punitive treatment of Industrial Court claimants and concluded that Ideal had *not* acted in good faith reliance on the advice of counsel in deciding to sue four totally innocent employees. In fact, it is readily apparent that even the use of the word "rely" is improper in this context. Ideal did not "rely" on its attorney. It *used* him as a weapon in implementing a malevolent plan to stop the filing of lawful Industrial Court claims.

Again, the issue is *not* whether or not the Trial Court or Appellate Court agrees with this conclusion or scenario. The issue is, does the evidence, viewed in a light most favorably to the Petitioners, warrant a conclusion by reasonable minds that Ideal had not acted in good faith? The obvious answer in this case is yes!

What is particularly distressing about the Appellate Court decision is that it utterly failed to even address the specific evidence enumerated and discussed herein. The Appellate Court failed to discuss or address the plant manager's meeting with the Deputy Sheriff as to sabotage, or the overwhelming body of evidence possessed by Ideal which proved these Petitioners had *not* filed false Industrial Claims.

In *Bertero v. National General Corporation,* 529 P.2d 608

(Cal.)(1974), the Court, at page 616, provides:

> "However, if the initiator acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, the defense fails.
>
> Similarly, counsel's advice must be sought in good faith and . . . *not as a mere cloak to protect one against a suit for malicious prosecution.*" (Emphasis added).

There was and is substantial evidence in the record to support the Jury's verdict. The Trial Court and the Appellate Court have denied these Petitioner's their fundamental right to a jury trial in this case.

Proposition Two: The Trial Court's Conditional Grant Of A New Trial Is In Direct Conflict With The Procedural Guidelines Established By The 10th Circuit And Other Court's Of Appeal.

The Trial Court essentially decided to conditionally grant a new trial because, in his opinion, the damages were excessive.

As will be argued in Petitioners' brief, if permitted, there is substantial evidence to support the jury's award of actual damages for:

(a) mental and emotional stress;

(b) lost reputation;

(c) humiliation;

(d) embarrassment; and

(e) lost income.

Moreover, this Court has ruled that with respect to intangible damages, the measure of these damages lies pecu-

liarly within the discretion of the jury. *Dimick v. Schiedt,* 293 U.S. 474, 55 S.Ct. 296; 79 L. Ed. 603 (1935). The same may be said with respect to punitive damages.

Again, the Trial Court's view of damages represents the substitution of its judgment for that of the jury — in blantant violation of Petitioners' Seventh Amendment Rights. Even if the Trial Court believed that the damages were excessive, his recourse was to do the following:

(a) given the substantial evidence in favor of liability, he should have first offered Petitioners a remittitur

(b) in the event Petitioners chose not to accept the remittitur, a new trial on *damages* only would be ordered.

This procedure was set out explicitly in *O'Gilvie v. International Playtex Inc.,* 821 F.2d 1438 (10th Cir. 1987); see also *Glazer v. Glazer,* 374 F.2d 390 (5th Cir. 1967); cert denied 389 U.S. 831; 88 S.Ct. 100. This procedure is specifically designed to avoid problems with the Seventh (7th) Amendment.

As with the Court's ruling on the Judgment NOV, the Trial Court's conditional grant of a new trial constituted a blatant violation of Petitioners' right to a jury trial under the Seventh Amendment to the Constitution.

Proposition Three: The Appellate Court's Dismissal Of Petitioner's Abuse Of Process Claim Is In Direct Conflict With Its Own Previous Rulings And Fundamental Principles Of The Common Law Of Abuse Of Process.

On page two (2) of Petitioners' original Complaint filed in this matter, Petitioners alleged as follows:

"3. That these allegations were knowingly false. That the allegations were made without probable cause. That the allegations were made maliciously with the intent to cause harm to the named Plaintiffs. That the allegations were made in a wanton and oppressive manner and in conscious disregard for the rights of the Plaintiffs.

4. That the allegations were made with the ulterior and unlawful purpose of:

a. intimidating the individual Plaintiffs into an abandonment of legitimate Workers Compensation claims;

b. intimidating other employees of the Defendant corporation into an abandonment of their legitimate Workers Compensation claims;

c. extorting concessions from the Plaintiff labor union in contract negotiations."

In response to Ideal's Motion to Dismiss this abuse of process claim, the Trial Court entered its Order of August 3, 1989, dismissing the abuse of process claim.

The Appellate Court affirmed the Trial Court and concluded at page (6) of its opinion:

"To establish the element of improper use of the process, it is clear that the plaintiff must show some definite act or threat by the defendant not authorized by the process."

However, that ruling is in direct conflict with *Houghton v. Foremost Financial Services Corp.*, 724 F.2d 112 (10th Cir. 1983) wherein the 10th Circuit concluded that the bringing of a replevin action for the purpose of enforcing a debt which was discharged in bankruptcy was an abuse of process. There was no contention in Houghton that Foremost had done anything except to proceed with a replevin action.

There was no act or threat by the Defendant which was not authorized by the replevin.

In *Gore v. Taylor,* 792 P.2d 432 (Okla. 1990), a case cited by the Appellate court in its opinion, the Gore Court quoted with approval the Restatement Second of Torts section 682 (1977) as follows:

> "One who uses a legal process, whether criminal or civil, against another *primarily to accomplish a purpose for which it was not designed is subject to liability for harm caused by the abuse of process.* (Emphasis added).
>
> The Gore Court then provided:
>
> Comment 'a' states that the gravamen of the misconduct for which liability is imposed is the *'misuse' of legal process for some purpose other than that which it was designed to accomplish.*"

Under the definition of abuse of process recognized by the Restatement, and as applied previously by the 10th Circuit Court of Appeal, if the unlawful and collateral purpose is "primary", an abuse of process claim will lie. If the improper purpose is secondary then there is no basis for the action.

The Petitioners' allegations were that Ideal commenced the underlying action knowing the allegations were false — with the *sole* and *primary* purpose of pursuing unlawful collateral objectives. These allegations were sufficient and the claims should not have been dismissed.

CONCLUSION

In conclusion, the Petitioners, Gene Meyers, Norman

Wyche, Aldo Eberle, and Donald Northcutt, respectfully pray this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

MALLOY & MALLOY, INC.

By:

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Counsel of Record
for the Petitioners

APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-7009

GENE MEYERS; NORMAN WYCHE;
ALDO T. EBERLE; DONALD NORTHCUTT,
Plaintiffs-Appellants,

v.

IDEAL BASIC INDUSTRIES, INC.,
a Delaware Corporation,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF OKLAHOMA
(D.C. No. 89-275-C)

Patrick J. Malloy III of Malloy & Malloy, Inc., Tulsa, Oklahoma (Leslie V. Williams, Jr. of Williams & Remmel, Oklahoma City, Oklahoma, with him on the briefs), for Plaintiffs-Appellants.

Mairen C. Kelly of Fisher & Phillips, Altanta, Georgia (Robert P. Foster, and Frank T. Bell of Fisher & Phillips, Atlanta, Georgia; J. Warren Jackman of Pray, Walker, Jackman, Williamson & Marlar, Tulsa, Oklahoma, with her on the brief), for Defendant-Appellee.

Before BALDOCK, BARRETT, and BRORBY,
Circuit Judges.

BRORBY, Circuit Judge.

I.

The appellants in this case, Gene Meyers, Norman Wyche, Aldo T. Eberle, and Donald Northcutt ("Plaintiffs" or "Appellants"), are former employees of Ideal Basic Industries, Inc. ("Defendant" or "Ideal"). They instituted an action for malicious prosecution and abuse of process against Ideal. Appellants' action followed the dismissal of Ideal's lawsuit against Appellants for allegedly engaging in a conspiracy to file fraudulent Workmen's Compensation claims and sabotage company property. The trial court granted Defendant's motion to dismiss the abuse of process claim. Plaintiffs' malicious prosecution claim proceeded to trial. The jury returned a verdict in favor of Plaintiffs and awarded them, collectively, actual damages in the amount of $7 million and punitive damages in the amount $8 million.[1] Subsequently, the trial court granted Defendant's motion for judgment notwithstanding the verdict.

On appeal, Appellants raise the following issues: "Whether Or Not The Trial Court Erred In Sustaining The Defendant's Motion For Judgment Notwithstanding the Verdict"; and "Whether Or Not The Trial Court Committed Error In Sustaining The Defendant's Motion For Summary Judgment With Respect To The Plaintiffs' Abuse Of Process Claim." We affirm.

II.

Ideal is a cement manufacturer with facilities located throughout the United States. Since 1984, due to an impasse in bargaining negotiations, Ideal's unionized employees at the plant in Ada, Oklahoma, have worked without a contract. In 1988, Gary Sauer was installed as the new plant manager at this facility. Prior to his arrival, Mr. Sauer

[1]The trial court subsequently reduced the punitive damages award to $7 million in accordance with Okla. Stat. tit. 23, § 9.

familiarized himself with the history of relations with the employees at the Ada plant. During this time, Mr. Sauer learned that the plant in Ada had recently been the target of acts of sabotage and that an unprecedented number of Workmen's Compensation claims for hearing and lung damage were filed by Ideal's workers at the Ada plant.

Shortly after his arrival in Ada, Mr. Sauer formed the opinion that there was illegal activity occurring "in the form of phony Work Comp filings and sabotage." He then obtained authorization to consult with outside counsel to seek advice on whether any legal remedy was available to stop what he believed was illegal activity. Ideal complied with this request and procured the services of Walter Kruger, a partner in a law firm specializing in labor law. Mr. Kruger came to Ada and conducted an investigation into the existence of illegal activity at the plant. Ideal placed no restrictions as to the scope of Mr. Kruger's investigation. Following his investigation, Mr. Kruger returned to Atlanta to evaluate the information he had compiled during his investigation. During the next few weeks, Mr. Kruger contacted Mr. Sauer several times requesting additional information such as further data from the employee files. Subsequently, Mr. Kruger informed Mr. Sauer there was sufficient cause to file a lawsuit against the Appellants.

Ideal then filed a complaint against Appellants charging, *inter alia*: conspiracy to file fraudulent Workmen's Compensation claims; deceit; sabotage; and violation of anti-racketeering laws. This complaint was subsequently dismissed by a consent order. Following the dismissal, Appellants brought this action against Ideal alleging malicious prosecution and abuse of process based upon Ideal's investigation of suit against them.

The district court dismissed the abuse of process claim prior to trial, and following a jury verdict in favor of the employee-Plaintiffs on the malicious prosecution claim,

granted Defendant's motion for judgment notwithstanding the verdict. The court also ruled hypothetically on Defendant's alternative motion for new trial, holding that absent the entry of judgment notwithstanding the verdict, it would grant a new trial.

III.

Dismissal of Abuse of Process Claim

We review the district court's dismissal for failure to state a claim *de novo*, applying the same scrutiny to the complaint as did the trial court. *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986). Thus, we also will "clothe plaintiff's claim in such fashion to presume all allegations true." *Id.*

As this is a diversity case, we apply the substantive law of the forum state. *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938). Under Oklahoma law, an abuse of process claim requires a showing of three elements: (1) issuance of process; (2) an ulterior purpose; and (3) a willful act in the use of process not proper in the regular conduct of the proceeding. *Tulsa Radiology Assocs., Inc. v. Hickman, 683 P.2d 537, 539 (Okla. Ct. App. 1984); see also* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts,* § 121 (5th ed. 1984) (hereinafter "Prosser"). In this case, the district court focused on Plaintiffs' failure to "allege facts in support of the third element . . . [stating there was] no showing that Ideal was using its lawsuit to obtain an advantage that was *collateral* to the lawsuit itself." In other words, the complaint failed to allege a *willful act* in the use of process *not proper in the regular conduct of the proceeding.* The court concluded Plaintiffs had failed to establish the necessary elements for the claim and therefore granted Defendant's motion to dismiss. We agree with this determination.

In this case, Plaintiffs alleged in their complaint, *inter*

alia, that the action brought against them by Ideal was based on allegations: "made with the ulterior and unlawful purpose of: . . . intimidating the individual Plaintiffs [and] . . . other employees of the Defendant corporation into an abandonment of their legitimate Workers Compensation claims; [and] . . . extorting concessions from the Plaintiff labor union in contract negotiations."

"Abuse of process occurs when legal process is used for an improper purpose, to accomplish an end not lawfully obtainable, or to compel someone to do some collateral thing he could not legally be compelled to do." *Houghton v. Foremost Fin. Servs. Corp.*, 724 F.2d 112, 116 (10th Cir. 1983) (citing *Neil v. Pennsylvania Life Ins. Co.*, 474 P.2d 961, 965 (Okla. 1970). To establish the element of improper use of the process, it is clear that the plaintiff must show *some definite act or threat* by the defendant not authorized by the process. *Gore v. Taylor*, 792 P.2d 432, 435 (Okla. Ct. App. 1990); *see also*, Prosser § 121. Prosser provides the following elaboration of this element:

> Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

Prosser, § 121 at 898. Thus, merely showing the defendant " 'carr[ied] out the process to its authorized conclusion, even though with bad intentions,' " is insufficient to establish an abuse of process claim. *Gore*, 792 P.2d at 435-36 (quoting Prosser, *Handbook of the Law of Torts*, § 121 (4th ed. 1971).

Even viewing Plaintiffs' complaint in the favorable light that we must, taking the allegations therein as true, we find it nevertheless fails to establish the necessary element of improper use of the process. While we take as true Plain-

tiffs' allegations that the ulterior and unlawful purpose of Ideal in bringing the claim was to intimidate Plaintiffs and other employees of Ideal into abandoning legitimate Workmen's Compensation claims and to extort concessions from the Union, Plaintiff's complaint still fails to establish an abuse of process claim since there is no allegation of some definite action or threat by Ideal. *See Gore*, 792 P.2d at 435-36. The only definite act alleged in Plaintiffs' complaint was Ideal's filing of the lawsuit. Under Oklahoma law, the absence of an allegation that some definite act or threat occurred showing an improper use of the process defeats a claim of abuse of process. *Id.* Without such an allegation the element of a willful use of the process not proper in the regular conduct of the proceeding cannot be satisfied. Therefore, we hold the district court's dismissal of the abuse of process claim prior to trial was proper.

Judgment Notwithstanding the Verdict — Malicious Prosecution

We review a grant or denial of a motion for judgment notwithstanding the verdict *de novo*, applying the same standard as did the trial court. *Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 1685 (1991); *Suggs v. State Farm Fire & Casualty Co.*, 833 F.2d 883, 886 (10th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988). We have expressed the appropriate inquiry under this standard as being " 'whether there is evidence upon which the jury could properly find a verdict for the party [against whom the motion is directed].' " *Rajala*, 919 F.2d at 615 (quoting *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 498-99 (10th Cir. 1984). In making this determination we must view the evidence and all inferences in a light most favorable to the nonmoving party. *Rajala*, 919 F.2d at 615. The nonmovant's position, however, must be supported by more than a mere scintilla of evidence. *E.E.O.C. v. Sperry Corp.*, 852 F.2d 503, 507 (10th Cir. 1988).

Because our review of the entry of a judgement notwithstanding the verdict asks whether evidence was presented such that the jury could *properly* find for the party against whom the motion was made, *id.*, our consideration is framed in terms of the underlying evidentiary standards applicable at the trial on the merits. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Under Oklahoma law, a plaintiff bears the burden of affirmatively showing the following elements to establish a claim of malicious prosecution: (1) the bringing of the action, (2) its successful termination in favor of the plaintiffs, (3) want of probable cause, (4) malice, and (5) damages. *Young v. First State Bank*, 628 P.2d 707, 709 (Okla. 1981); *Tulsa Radiology Assocs., Inc. v. Hickman*, 683 P.2d 537, 539 (Okla. Ct. App. 1984). Malicious prosecution actions are disfavored by the Oklahoma courts, and the elements of the action are narrowly construed. *See Glasgow v. Fox*, 757 P.2d 836, 838-39 (Okla. 1988).

The element at issue in this case is Ideal's want of probable cause. More particularly, the issue is whether Ideal's reliance on the advice of counsel, if made in good faith, vitiates any claim by Appellants of Ideal's lack of probable cause. The existence of probable cause is determined in light of the facts existing at the time the underlying action was filed. *Tulsa*, 683 P.2d at 539. The existence of probable cause constitutes a complete defense to an action for malicious prosecution. *Id.* "The fact that the action which is alleged to constitute the malicious prosecution has been terminated in favor of the complaining party is of itself insufficient to establish lack of probable cause on the part of the defendant . . . " *Lewis v. Crystal Gas Co.*, 532 P.2d 431, 433 (Okla. 1975). As to the effect of good faith reliance on the advice of counsel:

> As a general rule, where defendant acts in good faith on the properly secured advice of counsel, he is

> relieved from liability for a civil action instituted by him. It is well settled in this jurisdiction that *where the uncontroverted evidence shows that a party has communicated all the facts bearing on the case within his knowledge before a competent attorney, and has acted honestly and in good faith upon the advice given, then the absence of malice is established, the want of probable cause negatived, and he is exonerated from all liability.* Under these circumstances, an action for malicious prosecution will not lie.

Id. (emphasis added).

In this case, Gary Sauer was the decision-maker who initiated the action against Appellants that was subsequently dismissed. Mr. Sauer is vice president and general manager of Ideal's Southern division. Shortly after his arrival at the Ada plant, Mr. Sauer decided to hire outside legal counsel to investigate and advise him on whether there was a legal remedy available to redress what he suspected was illegal activity in the form of false Workmen's Compensation claims and sabotage. While Mr. Sauer possessed this general suspicion of illegal activity, he did not have evidence of any particular individual's involvement. Mr. Sauer instructed full cooperation with the attorney hired, and did not impose any limitations upon the scope of the attorney's investigation. Following several weeks of investigation and evaluation, Mr. Kruger advised Mr. Sauer that sufficient factual and legal grounds existed to bring this lawsuit against the four Appellants. Ideal contends the decision to initiate this action against Appellants was based upon its good faith reliance on this advice by counsel.

Appellants contend, however, that Ideal did not rely in good faith on the advice of counsel. In support of their contention, Appellants argue the reliance could not have been in good faith because: (1) Ideal possessed specific knowledge relative to the Appellants; (2) Ideal conducted

an independent investigation, or one in concert with counsel; and (3) Ideal did not make full or truthful disclosure to its counsel.

The district court granted Ideal's motion for judgment notwithstanding the verdict based on its conclusion "that it is uncontroverted that Sauer consulted competent counsel, imparted to him all facts known to Sauer, and thereafter relied upon counsel's advice in good faith." Prior to reaching its conclusion, the court articulated its concerns with the case as being: "(1) the distinction between probable cause for litigation as opposed to probable cause for litigation against an individual, and (2) the extent to which reliance on counsel forms a shield." The district court explained its analysis of these concerns as follows:

> In the case at bar, the decision-maker had evidence of acts of sabotage and suspicions of fraudulent workers' compensation claims. He turned the matter over to counsel, both for a *factual investigation* and the fashioning of any appropriate legal remedy. Perhaps to this day, and certainly during this trial. Sauer cannot relate what evidence made a lawsuit against these four individuals appropriate. The defense of reliance on counsel makes eminent sense in the criminal context. A citizen reports the facts as he knows them to the district attorney, for example. The district attorney then serves as an impartial arbiter who examines the facts and determines whether a criminal prosecution is appropriate. Thus, if the charging party has provided all facts known to him and in good faith follows the advice of the impartial prosecutor, the charging party should face no liability.
>
> The analogy holds to some extent in the civil context, and the law of Oklahoma recognizes the defense in civil cases. *See Lewis*, 532 P.2d 434. The Court was troubled in this case by the fact that, when Sauer con-

sulted attorney Kruger, Sauer had certain facts arguably supporting a lawsuit, but virtually no facts implicating the four individuals ultimately named in the lawsuit. The dichotomy of charging party-facts/attorney-law, usually present in a malicious prosecution action, is far from clear here. To sustain defendant's motion, the concept of reliance must be stretched to encompass not merely whether a legal action may succeed, but whether it may succeed against individuals not previously identified by the charging party . . .

In *Lewis, supra*, the court upheld a grant of summary judgment in favor of a charging party who undisputedly relied upon a lawyer's advice to name a particular defendant in a lawsuit. 532 P.2d at 432. The opinion does not indicate the amount of facts conveyed by the charging party. In *Herrick v. Devorak*, 155 P. 1153 (Okla. 1916), the charging party advised the county attorney of the destruction of his property by fire. The county attorney and the sheriff thereupon investigated and made a determination as to who the guilty parties were. Those charged were found not guilty by a jury and brought a malicious prosecution action. The court found such an action would not lie under those facts. *Id.* at 1154. Again, this Court believes that the structural safeguard of an official prosecutor's investigation, as opposed to that of one's own attorney in the civil context, is not to be ignored, but the Court has simply found no authority that such a consideration overrides Oklahoma's disfavor of malicious prosecution actions. The required disclosure is not of all facts discoverable, but all facts within the charging party's knowledge. *Williams v. Frey*, 78 P.2d 1052, 1056 (Okla. 1938). Plaintiffs assert a fact question as to good faith reliance, but have produced no supporting evidence.

On this point, as opposed to probable cause,

> Sauer's ignorance inures to defendant's benefit. There was no evidence that Sauer had previously suspected these four workers; therefore, there was necessarily no evidence that he "targeted" them or of lack of good faith. It is the jury's province to judge the credibility of witnesses. However, an inference is not reasonable where it is only a guess or a possibility not based upon the evidence. *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1324 (11th Cir. 1982). Where the evidence is uncontroverted, it is a complete defense. *Young*, 628 P.2d at 711.

Appellants argue that because Ideal possessed knowledge relative to the Appellants and conducted its own investigation in this case, the decision by Ideal to file suit upon reliance of counsel could not have been in good faith. The district court appropriately focused on the distinction of probable cause as to the existence of unlawful activities in general versus probable cause as to the named parties in the lawsuit. Moreover, probable cause in the context of malicious prosecution " 'does not mean legal cause . . . Probable cause has been defined as reasonable cause that of an honest suspicion or belief on the part of the instigator thereof, founded upon facts sufficiently strong to warrant the average person in believing the charge to be true.' " *Young*, 628 P.2d at 710 (quoting *Lewis*, 532 P.2d at 433). Here, Mr. Sauer did conduct some preliminary investigation into his general concerns regarding the history of worker relations at the Ada facility, the recent acts of sabotage that had occurred, and the unprecedented number of hearing and lung damage claims filed by Ada workers. This initial investigation led to his suspicions as to the existence of unlawful activities and possible motives therefor. However, Mr. Sauer did not possess any evidence as to the Appellants, nor did he encourage or suggest these Appellants be named. Mr. Sauer clearly testified his decision to bring the lawsuit against the four

Appellants was made in reliance upon the investigation and advice of counsel. No evidence exists in the record to suggest otherwise. In addition, Ideal's knowlege about the Appellants did not negate the good faith reliance it placed on the advice of its counsel. Ideal procured counsel to factually investigate the situation in Ada, assimilate the information compiled, and advise ideal as to whether or how to proceed. Mr. Sauer does not possess any legal training, and did not understand the legalities of the case as explained by Mr. Kruger. Mr. Sauer was entitled to assume Mr. Kruger considered all relevant information in making his recommendation as to the existence of sufficient factual and legal basis to bring a lawsuit against these four Appellants. *Ideal did not know anything about these Appellants that would have alerted them to a concern as to the propriety of Mr. Kruger's recommendation.*

We also have found no evidence presented to support Appellants' claim that Ideal did not make full and honest disclosure. Recognizing that disclosure in this context does not mean "a disclosure of all facts discoverable, but of all facts within [defendent's] knowledge . . . known either personally by defendant, or by credible information which he had reasonable grounds to believe;" *Lewis*, 532 P.2d at 433, we still find the evidence that such full disclosure was made is uncontroverted.

Upon careful consideration of the evidence presented at trial, and viewing that evidence and the inferences therefrom most favorably to the Appellants, we hold Ideal's instigation of the lawsuit against Appellants was based upon good faith reliance on counsel and the evidence supporting this conclusion is uncontroverted.[2] Indeed, we hold the

[2]In reaching this holding we dismiss Appellants' claim that the question of good faith reliance "was a fact question for the jury" as meritless as this determination would be a fact question only if evidence were presented by Appellants for their position. We have found no such evidence.

evidence so strongly supports Idea's claim of good faith reliance on counsel that reasonable minds could not differ on this issue. *See Ware v. Unified School Dist. No. 492*, 881 F.2d 906, 911 (10th Cir. 1989).

As noted, the burden is upon the plaintiff in a malicious prosecution action to affirmatively prove want of probable cause. *Young*, 628 P.2d at 709. *See also Lewis*, 532 P.2d at 433 ("In an action for malicious prosecution, the burden of proof is upon the plaintiff to prove want of probable cause.") Good faith reliance upon counsel by defendant is a complete defense to any such claim. *Id.* Under Oklahoma law, it is clear that when a party consults counsel and makes a complete and honest disclosure, "he has the right to rely on counsel's advice not only as to the legal effect but also as to the legal sufficiency of the facts furnished." *Id.* at 434. Having found the evidence uncontradicted on the issue of good faith reliance on counsel, we conclude the Appellants' claim that Ideal lacked probable cause to instigate the action was negated. Thus, there exists no evidence upon which the jury could properly have found for Appellants. *Rajala*, 919 F.2d at 615. Therefore, we hold the judgement notwithstanding the verdict was properly granted.

IV.

In light of our decision affirming the district court's grant of Ideal's motion for judgment notwithstanding the verdict, Ideal's motion for new trial is moot, as are Appellants' arguments relating thereto. 5A J. Moore & J. Lucas, *Moore's Federal practice*, ¶ 50.14 (2d ed. 1991).

For the aforementioned reasons we AFFIRM the decision of the district court in all respects.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 89-275-C

GENE MEYERS; NORMAN WYCHE;
ALDO T. EBERLE; DONALD NORTHCUTT,
Plaintiffs

vs.

IDEAL BASIC INDUSTRIES, INC.,
Defendant.

ORDER

Now before the Court for its consideration are the motion of the defendant Ideal Basic Industries, Inc. (Ideal) for judgment notwithstanding the verdict and the motion of Ideal for new trial.

On April 14, 1988, Ideal filed a complaint against a local union and four individual workers alleging that those defendants engaged in a conspiracy to file fradulent workers' compensation claims and to sabotage Ideal's property. The Complaint was assigned case no. 88-186-C. That action was ultimately dismissed, and the four workers then brought this action for malicious prosecution and abuse of process. The Court granted Ideal's motion for summary judgment as to the abuse of process claim. The malicious prosecution claim proceeded to trial, and the jury awarded actual damages in the amount of $7 million, and punitive damages in the amount of $8 million. By Order of September 1, 1989, the Court reduced the punitive damage award to $7 million in accordance with 23 O.S. §9.

Motion for Judgement N.O.V.

The Court is aware of the high standard involved in considering such a motion.

> Jury verdicts are not to be lightly overturned as courts recognize that a "traditional sanctity" attaches to the solemn verdict of a jury." "Judgment n.o.v. is proper only when the evidence so strongly supports an issue that reasonable minds could not differ." "In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party." The court "cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury."
>
> *Ware v. Unified School Dist. No. 492,* 881 F.2d 906, 911 (10th Cir. 1989) (citations omitted).

With this standard in mind, the Court reviews the record in this case. Ideal argued that its decision-maker determined to file suit on the advice of counsel, Walter Kruger.

Malicious prosecution actions are not favored under Oklahoma law. *See Glasgow v. Fox,* 757 P.2d 836, 838, 839 (Okla. 1988). Under that controlling law, such an action only accrues when five elements exist: the bringing of an action, successful termination in favor of the plaintiff, lack of probable cause, malice, and damages. *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1124 (10th Cir. 1979). The present motion for j.n.o.v. primarily focuses on the probable cause element. While malicious prosecution actions usually follow criminal proceedings, they may also be brought based upon civil actions. *See, e.g., Young v. First State Bank, Watonga,* 628 P.2d 707, 710 (Okla. 1981) ("[T]he mere bringing of a civil suit, without more, is sufficient to support the action.") One who initiates civil proceedings against another has probable cause for so doing if he reasonably believes in the existence of facts upon which his claim is based, and that under such facts the claim may be valid. *Lewis v. Crystal Gas Co.*, 532 P.2d 431, 433 (Okla. 1975). *See also Towne v. Martin*, 166 P.2d 98, 100 (Okla. 1945).

Defendant places great emphasis upon reliance on counsel. The Supreme Court of Oklahoma has stated:

> As a general rule, where defendant acts in good faith on the properly secured advice of counsel, he is relieved from liability for a civil action instituted by him. It is well settled in this jurisdiction that where the uncontroverted evidence shows that a party has communicated all the facts bearing on the case within his knowledge before a competent attorney, and has acted honestly and in good faith upon the advice given, then the absence of malice is established, the want of probable cause negatived, and he is exonerated from all liability. Under these circumstances, an action for malicious prosecution will not lie.
>
> *Lewis*, 532 P.2d at 433. *See also Kitchens v. Bryan County Nat. Bank*, 825 F.2d 248, 253 (10th Cir. 1987).

Gary Sauer, vice president and general manager of defendant's southern division made the decision to file the lawsuit (Tr.412 L.2-3). He believed that workers' compensation claims filed as to lungs were not legitimate (Tr. 447 L.14-15), and he sought a legal remedy to stop what he thought must be illegal (Tr.573 L.21-25). Sauer asked attorney Walter Kruger to investigate. (Tr.575 L.1-3). Although Sauer instructed full cooperation with Kruger, Sauer himself did not conduct an investigation (Tr.575). Sauer had no evidence that the four named workers had committed acts of sabotage, either before or after he consulted Kruger (Tr. 450 L.14-17).[1] Sauer knows nothing of any evidence which Kruger may have unearthed (Tr.456 L.24-25). Sauer did not request that the four workers be named as defendants, and was not familiar with the term "probable cause" (Tr.577-8). To Sauer,

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[1]The Complaint did not expressly allege acts of sabotage on the four workers' part.

Kruger's explanation of the lawsuit consisted in part of "legal mumbo-jumbo" (Tr.444 L.25-445 L.1-3). Sauer relied upon Kruger in commencing the litigation (Tr. 578 L.6-13). Sauer testified that he did not make up his mind to file suit until Kruger so advised him (Tr.437 L.13-18; 444 L.19-20; 446 L.17-19; 581 L.2-9).

The Court's concerns in this case were (1) the distinction between probable cause for litigation as opposed to probable cause for litigation against an individual, and (2) the extent to which reliance on counsel forms a shield. In the case at bar, the decision-maker had evidence of acts of sabotage and suspicions of fraudulent workers' compensation claims. He turned the matter over to counsel, both for a *factual investigation* and the fashioning of any appropriate legal remedy. Perhaps to this day, and certainly during this trial, Sauer cannot relate what evidence made a lawsuit against these four individuals appropriate. The defense of reliance on counsel makes eminent sense in the criminal context. A citizen reports the facts as he knows them to the district attorney, for example. The district attorney then serves as an impartial arbiter who examines the facts and determines whether a criminal prosecution is appropriate. Thus, if the charging party has provided all facts known to him and in good faith follows the advice of the impartial prosecutor, the charging party should face no liability.

The analogy holds to some extent in the civil context, and the law of Oklahoma recognizes the defense in civil cases. *See Lewis*, 532 P.2d at 434. The Court was troubled in this case by the fact that, when Sauer consulted attorney Kruger, Sauer had certain facts arguably supporting a lawsuit, but virtually no facts implicating the four individuals ultimately named in the lawsuit. The dichotomy of charging party-facts/attorney-law, usually present in a malicious prosecution action, is far from clear here. To sustain defendants' motion, the concept of reliance must be stretched to

encompass not merely whether a legal action may succeed, but whether it may succeed against individuals not previously identified by the charging party. (*See also* Tr.547 L.13-21; Tr.548 L.7-24; Tr.558 L.2-7; Tr.561 L.7-11).

In *Lewis, supra*, the court upheld a grant of summary judgment in favor of a charging party who undisputedly relied upon a lawyer's advice to name a particular defendant in a lawsuit. 532 P.2d at 432. The opinion does not indicate the amount of facts conveyed by the charging party. In *Herrick v. Devorak*, 155 P. 1153 (Okla. 1916), the charging party advised the county attorney of the destruction of his property by fire. The county attorney and the sheriff thereupon investigated and made a determination as to who the guilty parties were. Those charged were found not guilty by a jury and brought a malicious prosecution action. The court found such an action would not lie under those facts. *Id.* at 1154. Again, this Court believes that the structural safeguard of an official prosecutor's investigation, as opposed to that of one's own attorney in the civil context, is not to be ignored, but the Court has simply found no authority that such a consideration overrides Oklahoma's disfavor of malicious prosecution actions. The required disclosure is not of all facts discoverable, but all facts within the charging party's knowledge. *Williams v. Frey*, 78 P.2d 1052, 1056 (Okla. 1938). Plaintiffs assert a fact question as to good faith reliance, but have produced no supporting evidence.

On this point, as opposed to probable cause, Sauer's ignorance inures to defendant's benefit. There was no evidence that Sauer had previously suspected these four workers; therefore, there was necessarily no evidence that he "targeted" them or of lack of good faith. It is the jury's province to judge the credibility of witnesses. However, an inference is not reasonable where it is only a guess or a possibility not based upon the evidence. *Daniels v. Twin Oaks*

Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982). Where the evidence of reliance is uncontroverted, it is a complete defense, *Young*, 628 P.2d at 711.

After careful consideration of the record, the Court must conclude that it is uncontroverted that Sauer consulted competent counsel, imparted to him all facts known to Sauer, and thereafter relied upon counsel's advice in good faith. Therefore, the verdict may not stand.

New Trial Motion

In the interest of thoroughness and to aid appellate review, the Court will address the arguments raised in defendant's motion for new trial.

The principal argument in defendant's new trial brief is based largely on confusion. Essentially, the argument is that, through plaintiffs' machinations, the Court improperly excluded evidence of the details of Kruger's investigation. Defendant is wrong on both counts. Plaintiffs merely obeyed the Court's instructions, and the Court consistently — in the face of counsel's best efforts — barred evidence as to the investigation itself. The Court explained several times that the issue was whether defendant's decision-maker relied in good faith upon Kruger's advice and that therefore what Kruger actually did was irrelevant. (*See, e.g.*, Tr.616 L.19 - 617 L.10) Defendant's counsel fought against this reasoning:

MR. JACKMAN: Part of the confusion, Your Honor, arises from the fact that here in the motion in limine you permitted all of our affidavits to be permitted as constituting body of knowledge. And now the only witnesses that I can - who Mr. Kruger relied on.

THE COURT: Well, if I had realized that, but

that wasn't the representation that was given to me before. Now you're telling me that you didn't rely on that on those affidavits.

MR. JACKMAN: No, Mr. Kruger did, if Your Honor please.

THE COURT: You told me Ideal did.

MR. JACKMAN: Well, Ideal did –

THE COURT: I see now that you look upon Mr. Kruger as your employee and you're responsible for his actions in this whole thing.

MR. JACKMAN: No, I strongly object to that.

(Tr.636 L24 – 637 L15).

In its new trial brief, defendant now argues that plaintiffs asserted that Kruger's investigation was a sham, and that defendant was prohibited from responding. Actually, plaintiff's argument was that Sauer had already made up his mind to bring suit and ignored Kruger's investigation. This is *not* an argument that the investigation was a sham. Many of the comments of plaintiffs' counsel quoted by defendant were made in chambers and not to the jury. Those made to the jury were not objected to by defendant's counsel. In any event they are not supportive of defendant's argument. Obviously, it is possible to hypothesize a situation in which a charging party may or may not have had probable cause, but did not rely on counsel at all. The fact that a showing of reliance on counsel "negates" lack of probable cause does not mean that probable cause and reliance should not be kept analytically distinct, as the Court did by its evidentiary ruling. A new trial should not be granted on this basis.

Defendant also argues that various jury instructions given by the Court were erroneous. The Court has reviewed the instructions, and believes that they were proper.

Ideal also attacks the award of punitive damages on due process grounds. In *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989), the United States Supreme Court held that the Excessive Fines Clause of the Eighth Amendment did not bar an award of civil punitive damages. The Court left open a due process attack which might place an outer limit on undue jury discretion. *Id.* at 2921. Until the Supreme Court expressly finds such an outer limit, and articulates standards for enforcing it, this Court declines to do so. This Court believes that the issue can be adequately addressed under existing standards.

Ideal also moves for a new trial on the ground that the verdict was against the weight of the evidence. Such a motion is addressed to the discretion of the trial court. *Tafoya v. Sears Roebuck and Co.*, 884 F.2d 1330, 1342 (10th Cir. 1989). For reasons previously set forth, the Court finds that the defense of reliance on counsel was established in undisputed fashion. Accordingly, the Court concludes that the verdict was against the weight of the evidence, and that a new trial would be proper.

Ideal further asserts that the damage award herein was excessive. As to remittitur, the applicable standard is that

> absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate.
>
> *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981) (footnote omitted) (en banc) (Plurality opinion), *cert. denied*, 464 U.S. 824 (1983).

The Court has reviewed the damage award and does find it to be so excessive that it must have resulted from passion or prejudice. In *Malandris*, the court went on to state:

> Such cases recognize the principle that if the court determines that the verdict was the result of passion or prejudice, or for any other reason it appears that the jury erred or abused its discretion not only on the issue of damages but also on the issue of liability, the court must unconditionally order a new trial and cannot give the plaintiff the option ot accept a lesser amount.
>
> *Id.* at 1168.

For reasons previously recited, the Court has concluded that the jury erred not merely as to damages but as to liability. Therefore, a new trial would be appropriate, absent the entry of a judgment n.o.v.

The record before the Court does not reflect an "ideal" background to the filing of the initial lawsuit. However, in the Court's view and under Oklahoma law, whatever factual questions exist as to lack of probable cause were "negatived" by reliance on counsel. These were the only proper issues to be tried, and they determined the admissible evidence. This is reflected in the following exchange with plaintiff's counsel:

THE COURT: But whether the lawyers did it capably, competently or incompetently is not an issue in this lawsuit.

MR. WILLIAMS: All right sir.

THE COURT: Well, do you want to say something or not?

MR. WILLIAMS: Well, Your Honor, I think if the lawyers did it incompetently, totally incompetently, and they were –

THE COURT: Then you ought to sue the lawyers.

MR. WILLIAMS: The reason we didn't was we wanted to keep this trial date.

THE COURT: Well, that's your decision.

(Tr.488 L.24 - 489 L.11).

Rule 11 F.R.Cv.P. likewise provides redress if a frivolous action is brought. Such a determination would be made only after factual inquiry based upon the appropriate standards. This Court expresses no view on other issues and facts not properly presented. The fact is that the plaintiffs chose their defendant and chose their remedy, and must abide by Oklahoma law governing same. In that context, the Court has determined that the jury's verdict may not stand.

It is the Order of the Court that the motion of the defendant Ideal Basic Industries, Inc. for judgment notwithstanding the verdict is hereby GRANTED.

It is the further Order of the Court that the motion of the defendant for new trial is hereby declared moot. However, the Court states that said motion would be granted in the absence of the judgment n.o.v. motion.

IT IS SO ORDERED this 30th day of January, 1990.

/s/ H. DALE COOK
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 89-275-C

GENE MEYERS; NORMAN WYCHE;
ALDO T. EBERLE; DONALD NORTHCUTT,
Plaintiffs

vs.

IDEAL BASIC INDUSTRIES, INC.,
Defendant.

JUDGMENT

In accordance with the Court's ruling on defendant's motion for judgment notwithstanding the verdict,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of the defendant Ideal Basic Industries, Inc. and against the plaintiffs.

IT IS SO ORDERED this 30th day of January, 1990.

/s/ H. DALE COOK
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 88-186-C

IDEAL BASIC INDUSTRIES, INC.,
Plaintiff

v.

LOCAL 114 OF THE CEMENT, LIME, GYPSUM & ALLIED WORKERS, DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS IRON SHIP BUILDERS, BLACKSMITHS FORGERS & HELPERS, OTTO T. EBBERLE, JR., R. GENE MYERS, DONALD NORTHCUTT, AND NORMAN L. WYCHE,
Defendants

COMPLAINT

Comes now Plaintiff, IDEAL BASIC INDUSTRIES, INC. (here-after Ideal) by and through its undersigned counsel and hereby files this Complaint against Defendants above named, alleging as follows:

PARTIES AND JURISDICTION

1.

Plaintiff Ideal Basic Industries, Inc. is a Delaware corporation in the business of cement manufacturing and distribution throughout the United States, is an enterprise engaged in and the activities of which affect intērstate commerce, and operates a cement manufacturing plant in Ada, Oklahoma.

2.

Defendant Local 114 of the Cement, Lime, Gypsum & Allied Workers Division of the International Brotherhood

of Boilermakers Iron Ship Builders, Blacksmiths, Forgers & Helpers (hereafter Local Union) is a local labor union organized and operating in Oklahoma, purporting to represent the employees of Plaintiff Ideal, and is an enterprise engaged in or the activities which affect interstate commerce.

3.

Defendants Otto T. Ebberle, R. Gene Myers, Donald Northcutt, and Norman L. Wyche (hereafter Individual Defendants), are residents of Oklahoma, employees of Plaintiff Ideal at its Ada, Oklahoma, cement plant, and members and/or officers of Local Union.

4.

This Court has jurisdiction of this matter pursuant to the Racketeer Influenced and Corrupt Organizations Act, specifically 18 U.S.C. §1964(a) and (c), the Doctrine of Pendent Jurisdiction, and upon diversity grounds as prescribed by 28 U.S.C. §1332.

FACTS

5.

Since 1984, Individual Defendants have been employed at Ideal without the existence of any collective bargaining agreement between Ideal and Local Union, much to the chagrin of Defendants.

6.

Upon information and belief, subsequent to the expiration in 1984 of the last collective bargaining agreement between Local Union and Ideal, and continuing up to and including the present time, Defendants have engaged in an "inside game" of work place strategy including a conspiracy to file nonmeritorious, false, and fraudulent workers compensation claims against Ideal, and also including as well a series of sabotages directed against Ideal company property.

7.

Upon information and belief, one purpose of the aforesaid conspiracy was the ulterior motive of subjecting Ideal to improper pressure to force it to enter a collective bargaining agreement on terms more favorable to the Union than the Union otherwise had the strength to negotiate.

8.

Upon information and belief, an additional purpose of the aforesaid conspiracy was to obtain money and benefits from Ideal by way of false representations, claiming occupational illnesses or injuries that were in fact nonexistent and/or not attributable to the employment of the Individual Defendents by Ideal.

9.

Upon information and belief, the following overt acts have been committed by and on behalf of Defendants in furtherance of the aforesaid conspiracy:

a) The Individual Defendants have threatened, filed, pursued, and/or continued to pursue individual nonmeritorious, false, and fraudulent workers compensation claims against Ideal by alleging to have suffered occupational illness or injury affecting their breathing, hearing, and/or other maladies that are in fact nonexistent and/or not attributable to employment of Individual Defendants by Ideal.

b) Individual Defendants have attempted to induce other employees to file workers compensation claims against Ideal.

c) Individual Defendants have offered to get workers compensation claims dropped in an attempt to coerce Ideal's forebearance in making legitimate business decisions such as layoff.

d) Local Union through its agent and International Representative George Fields has threatened and coerced

Ideal (i) by stating that because management allegedly continually mistreated employees at the Ada plant and because of wage cuts, the employees at the Ada plant were prompted to file all of the workers compensation claims; (ii) by stating that he supported them in those claims; (iii) by stating that if wage cuts and mistreatment of Ideal employees at another Ideal location come about, he could assure that Ideal would see a lot of workers compensation claims at that location as well; (iv) by stating that he would support employees by bringing attorneys right into the union hall to advise employees how to go about filing such claims; (v) by stating that their $300 per hour lawyers could overpower the Company's $50 per hour lawyers; and (vi) by stating that Ideal could avoid this situation if it would treat employees fairly.

10.

Upon information and belief, Local Union has engaged in a series of sabotages directed against Company property, including but not necessarily limited to inserting a long length of pipe into a cement silo causing it to malfunction, causing it to bury a customer's truck in cement, causing danger to property and person, causing interruption and delay in the business operations of Ideal; breaking windows in a dump truck at Ideal's Ada plant causing destruction of property, potential intimidation of personnel, and interruption and delay in Ideal's operations; cutting the quarry to plant conveyor belt on two occasions, the first coinciding with a time when the conveyor belt was left loaded overnight causing damage to property, delay, and interruption to Ideal's operation; and plugging air inlets with ear plugs causing the gas mixture to burn too hot, potentially causing the melting of the burner tips, and the resulting danger to person and property at Ideal's Ada, Oklahoma, cement plant.

COUNT I - RICO

11.

By the aforesaid conspiracy to threaten, file, and pursue nonmeritorious, false, and fraudulent workers compensation claims, Defendants have engaged in a pattern of racketeering activity through having devised a scheme to defraud and obtain money by means of false and fraudulent pretenses and representations, and for the purpose of executing such scheme have knowingly caused to be delivered by mail on numerous occasions documents and claim forms in aid of such scheme, in violation of 18 U.S.C. §1342 entitled Frauds and Swindles.

12.

The aforesaid series of sabotages directed against Ideal Company property constitutes a pattern of racketeering acts that has obstructed, delayed, interfered with, and affected commerce and the movement of a commodity in commerce by physical violence to property in violation of 18 U.S.C. §1951 entitled Interference with Commerce by Threats or Violence (the Hobbs Act).

13.

The aforesaid conspiracy to file nonmeritorious, false, and fraudulent workers compensation claims against Ideal constitutes a pattern of racketeering activity that has obstructed delayed, interfered with, and affected commerce and the movement of a commodity in commerce by effectively extorting money from Ideal under color of official right in violation of 18 U.S.C. §1951 entitled Interference With Commerce By Threats or Violence (the Hobbs Act).

14.

By the aforesaid conduct, Defendants have engaged in a pattern of racketeering activity under the Racketeer Influ-

enced and Corrupt Organizations Act, 18 U.S.C. §1961.

15.

By the aforestated conduct, Defendants have attempted to maintain an interest and control in Ideal in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(b).

16.

By the aforestated conduct, Defendants have attempted to participate in the affairs of Ideal through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(c).

17.

By the aforestated conduct, Individual Defendants have participated in and conducted the affairs of Local Union through a pattern of racketeering activity, all to the detriment of the rights of Ideal, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(c).

18.

By the aforestated conduct, Defendants conspired to violate the provisions of the Racketeer Influenced and Corrupt Organizations Act in violation of 18 U.S.C. §1962(d) of that Act.

COUNT II - CONSPIRACY

19.

By the aforesaid conduct, Defendants violated the rights of Ideal by committing the statutory crime of conspiracy against Ideal by conspiring falsely to maintain workers compensation claims against Ideal and thereby to cheat and defraud Ideal of its money and property. 21 Okla. Stats. Ann. §421, 76 Okla. Stats. Ann. §1.

COUNT III - DECEIT

20.

By the aforesaid conduct, Defendants violated the rights of Ideal by committing the statutory tort of deceit against Ideal by willfully deceiving Ideal, as well as the tribunals deciding Defendant's workers compensation claims against Ideal, as to the existence of occupational illness and injury, by asserting said occupational illness and injury while knowing them to be untrue and/or lacking reasonable grounds to believe they were true, with the intent to induce Ideal to pay monies to Defendants based on Defendants' deceits. 76 Okla. Stats. Ann. §§1 and 2.

COUNT IV - ABUSE OF PROCESS

21.

By the aforesaid conduct, Defendants violated the rights of Ideal by abusing the process of the workers compensation claims system through using their workers compensation claims for the ulterior purpose of bringing pressure on Ideal to enter a collective bargaining agreement on terms more favorable to the Union than the Union otherwise had the strength to negotiate, and by more recently offering to dismiss workers compensation claims in an attempt to coerce Ideal in its exercise of legitimate business decisions concerning layoff.

DAMAGES

22.

As a direct, proximate, and foreseeable result of the aforestated conduct by Defendants, Ideal has been injured, suffered damages, and incurred expenses, including the infringement of its right to make lawful business decisions free from illegal pressure brought to bear through a pattern of racketeering actions by Defendants, expenditures of large

sums of money for attorneys fees, costs, expenses, and other payment in responding to nonmeritorious, false, and fraudulent workers compensation claims, delay and standing idle of portions of its operation while repairing, replacing damaged equipment caused by sabotage, damages to its facilities and equipment caused by sabotage, all in excess of the sum of $250,000.

RELIEF

WHEREFORE, having stated its claim against Defendants Local Union, Ebberle, Myers, Northcutt, and Wyche, Plaintiff Ideal requests the Court to enter judgment in favor of Plaintiff and against Defendants as follows:

a) Enjoining Defendants from further racketeering activity including specifically the pursuit or encouragement of nonmeritorious, false, and fraudulent workers compensation claims against Ideal;

b) Ordering Individual Defendants to be divested of any further interest in and control of Local Union and prevented from participating in the conduct of Local Union through a pattern of racketeering activity, and therefore ordering that no Individual Defendant should henceforth hold membership, office, or any position in Local Union;

For compensatory damages in excess of $250,000 and in such amounts as may be proven to have been lost by Ideal for attorneys fees, costs, expenses, and other payments in responding to Defendants' conspiracy to file nonmeritorious, false, and fraudulent workers compensation claims, for obstruction of Ideal's operations, and for damage to Ideal's Company property, jointly and severally against Defendants Local Union, Ebberle, Myers, Northcutt, and Wyche;

d) For treble damages in the amount of $1,000,000. jointly and severally against Defendants Local Union, Ebberle, Myers, Northcutt, and Wyche;

e) For punitive damages in the amount of $25,000.

against Defendant Local Union and $25,000. each against Individual Defendants Ebberle, Myers, Northcutt, and Wyche;

f) For attorneys fees;

g) For costs and expenses;

h) For such other relief as the Court deems just and proper.

Respectfully submitted,

FISHER & PHILLIPS

By: /s/ Walter J. Kruger III
WALTER J. KRUGER III

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Atlanta, Georgia 30383
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and

ROBINSON, LOCK, GAGE, FITE
& WILLIAMS

By: /s/ Betty Outhier Williams
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APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 89-275-C

GENE MEYERS, NORMAN WYCHE, ALDO T. EBERLE, DONALD NORTHCUTT, GEORGE FIELD, AND LOCAL 114 UNION OF CEMENT, LIME, GYPSUM & ALLIED WORKERS OF INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON, SHIPBUILDERS, BLACKSMITHS, LOGGERS AND HELPERS,
Plaintiffs,

vs.

IDEAL BASIC INDUSTRIES, INC.,
Defendant.

ORDER

Before the Court for its consideration is the motion of defendant, Ideal Basic Industries, Inc. (Ideal), for summary judgment on plaintiffs' claim for malicious prosecution and the motion of defendant to dismiss plaintiffs' claim for abuse of process.

In 1984 the collective bargaining agreement expired between Ideal and Local 114 of the Cement Lime Gypsum and Allied Workers Union. Following expiration of the agreement, Ideal experienced an increase in vandalism which Ideal alleges were acts of sabotage by union members. Ideal also experienced an increase in workers' compensation claims filed by its employees.

On April 14, 1988, Ideal filed a complaint in this Court, alleging that the workers' compensation claims and vandalism were part of an unlawful scheme participated in by the

complainants.[1] On September 22, 1988 Ideal amended its complaint and asserted four causes of action: Rico,[2] conspiracy,[3] deceit and abuse of process.[4]

Complainants counterclaimed asserting wrongful discharge,[5] abuse of process[6] and RICO. The parties voluntarily dismissed the original action with complainants reserving the right to refile a new action for malicious prosecution and abuse of process against Ideal.

Malicious Prosecution

In Order to recover under its claim for malicious prosecution complainants carry the burden of proof as to five separate elements: bringing of the original action by defendant, its successful termination in plaintiff's favor, lack of probable cause, malice and damages. *Lewis v. Crystal Gas Co.,* 532 P.2d 431 (Okla. 1975). In its motion for summary judgment, Ideal relies on two complete defenses to the malicious prosecution claim. Its good faith belief in the existence of probable cause at the time the action was

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[1]Local 114 and the remainder of the parties designated as plaintiffs herein were defendants in the original action brought by Ideal. To avoid confusion, the plaintiffs herein will be referred to collectively as "complainants".

[2]Racketeer Influenced and Corrupt Organizations Act.

[3]Under the Oklahoma state criminal code.

[4]Asserting abuse of process within the state workers' compensation counts.

[5]Asserting discharge for exercising their rights to file workers' compensation claims.

[6]In filing the federal action, motivated solely by the purpose of intimidating complainants.

commenced and Ideal's reliance on advice of counsel in instigating the action. In support thereof Ideal provides the Court with affidavits and other documentary evidence which illustrate that Ideal undertook an investigation prior to commencing suit. Ideal asserts that it and its attorneys reviewed documents, company files, government reports and union publications in their efforts to evaluate their claim. Ideal's attorneys obtained affidavits from employees, reviewed medical reports, examined workers' compensation proceedings and concluded that complainants were involved in an unlawful scheme to interfere with Ideal's legitimate business rights.

Further, Ideal furnishes the Court with an affidavit from Gary Sauer, who was employed by Ideal as Vice President and General Manager at the Ada, Oklahoma plant when the original suit was filed. Mr. Sauer attests that Ideal repeatedly conferred with its attorneys prior to filing the suit and based upon their advice that probable cause did exist, Ideal authorized filing of the lawsuit on April 14, 1988.

In response, complainants provide the Court with deposition testimony to refute Ideal's contentions. For example, complainants offer the depositions of the sheriff and deputy sheriff of Pontotoc County who were involved in investigating the acts of vandalism at Ideal's plant in Ada. Both deponents deny they informed Ideal that the vandalism were acts of sabotage by union members. Both concluded that the destruction was a result of vandalism but their investigation was inconclusive as to who perpetrated the offense. Complainants also offer the deposition of Ronnie Lee Hicks who contends that at the time he signed an affidavit for Ideal he was under a lot of stress and was fearful of losing his job at the plant.

Further, complainants rely on these and similar exhibits to refute Ideal's defense of reliance on advice of counsel. Complainant contends that Ideal did not provide its attorney

with a full, fair and honest disclosure of its motivation for filing the action, and therefore Ideal is not shielded from liability. *Relying on, Miller v. Bourne*, 256 P.2d 431 (Okla. 1953).

The Court therefore concludes that under the requisite standard for imposition of summary judgment, Ideal is not entitled to judgment on the pleadings. Although Ideal presented the Court with substantial evidence in its favor, complainants have raised sufficient factual disputes to defeat defendant's motion for judgment at this stage in the proceedings on complainants' claim for malicious prosecution.

Abuse of Process

In order to recover under their claim for abuse of process, complainants carry the burden of proof as to three essential elements: issuance of process, an ulterior purpose and a willful act in the use of process not proper in the regular conduct of the proceedings. *Tulsa Radiology Assoc. v. Hickman*, 683 P.2d 537, 539 (Ok.App. 1984). The third element is explained as:

> [s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, . . . and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself.
>
> *Id.* citing Prosser, *Handbook of the Law of Torts* §121 (4th ed. 1971).

Complainants assert that Ideal's ulterior motive in instigating the action was to intimidate the individual complainants and other employees into abandoning their legitimate workers' compensation claims and extorting concessions

from the Union in contract negotiations. This assertion is insufficient to state a claim for abuse of process. Abuse of process consists of the misuse or misapplication of the judicial process to accomplish some purpose not warranted by the complaint. *See Neil v. Pennsylvania Life Ins. Co.*, 474 P.2d 961, 965 (Okla. 1970). Abuse of process occurs when legal process is used for an improper purpose, to accomplish an end not lawfully obtainable, or to compel someone to do some collateral thing he could not legally be compelled to do. *Houghton v. Foremost Financial Services*, 724 F.2d 112, 116 (10th Cir. 1983 citing Prosser, *Law of Torts*, §121 (4th Ed. 1971). Ideal filed its original action asserting that complainants were allegedly involved in an unlawful scheme to interrupt its business, this alleged unlawful scheme included the assertion that complainants were filing fraudulent workers' compensation claims and performing other acts of sabotage to compell Ideal to enter into negotiations. The motivation behind the union's actions was an issue raised by the complaint. Therefore complainants have failed to allege facts in support of the third element. There is no showing that Ideal was using its lawsuit for a coercive purpose to obtain an advantage that was *collateral* to the lawsuit itself.

Wherefore, premises considered, it is the Order of the Court that the motion of defendant Ideal Basic Industries, Inc., for summary judgment as to complainants' claim for malicious prosecution is hereby DENIED.

It is the further Order of the Court that the motion of defendant Ideal Basic Industries, Inc., to dismiss complainants' claim for abuse of process is hereby GRANTED.

IT IS SO ORDERED this 3rd day of August, 1989.

/s/ H. Dale Cook
H. DALE COOK
United States District Judge

Supreme Court, U.S.
FILED
DEC 19 1991
OFFICE OF THE CLERK

(2)

NO. 91-771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GENE MEYERS, NORMAN WYCHE,
ALDO EBERLE, and DONALD NORTHCUTT,
Plaintiffs-Petitioners,

v.

IDEAL BASIC INDUSTRIES, INC.,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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December 19, 1991

QUESTIONS PRESENTED

1. Whether the Tenth Circuit affirmance of judgment n.o.v. on Petitioner's malicious prosecution claim, which is grounded on settled Oklahoma common law, is supported by the record, and raises no unique, compelling conflicting issues, mandates denial of this Petition?

2. Whether, on Petitioners' malicious prosecution claim, the Tenth Circuit fully, fairly and accurately addressed and resolved all material issues raised in this Petition, thereby mandating summary denial of this Petition?

3. Whether Petitioners' failure to allege an abuse of judicial discretion mandates affirmance of the trial court's conditional grant of new trial?

4. Whether the Tenth Circuit order affirming dismissal of Petitioners' abuse of process claim, which involves application of Oklahoma common law to undisputed record facts, is supported by the record, and involves no unique, compelling or conflicting issues, mandates denial of this Petition?

5. Whether, on Petitioners' abuse of process claim, the Tenth Circuit fully, fairly and accurately addressed all material issues here raised as grounds for review, thereby mandating summary denial of this Petition?

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STATEMENT OF THE CASE

These Oklahoma common law claims arise from a 1988 lawsuit filed by the Ideal Basic Cement Company[1] (hereinafter "the Company" or "Ideal") alleging conspiracy (the "conspiracy claim") and naming Petitioners as defendants. Petitioners' Appendix pp. 2a, 3a (hereinafter cited as "App."). The conspiracy claim and Petitioners' various counterclaims were voluntarily dismissed in 1989, with the exception of Petitioners' malicious prosecution and abuse of process claims. Id.

The trial court dismissed the abuse of process allegations for failure to state a claim under Oklahoma law. App. 2a, 3a, 4a-6a. The malicious prosecution claim went to trial. The jury's verdict was for Petitioners. App. 2a, 3a.

On January 30, 1990, the trial court vacated that verdict and entered judgment n.o.v. for the Company. App. 2a, 3a-4a, 9a, 19a. The trial court held that uncontroverted evidence of reliance on counsel negated the prima facie element of "lack of probable cause", and established an absolute defense to malicious prosecution. App. 17a-19a. The trial court also found that the jury verdict was against the manifest weight of the evidence and reflected jury passion and prejudice. App. 21a-22a. In the absence of judgment n.o.v., a new trial was required. Id.

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[1] Ideal's inter-corporate structure is as follows: Ideal was merged into Holnam Inc. on or about March, 9, 1990. Holnam Inc. has one subsidiary not wholly-owned, St. Lawrence Cement, Inc. Holnam Inc. is owned by Holdernam Inc., which in turn is owned by Holderbank Financiere Glaris Ltd.

On appeal, the Tenth Circuit examined the dismissal and judgment n.o.v. issues de novo. App. 4a, 6a. The Court affirmed the trial court's orders in their entirety (App. 6a, 13a) and thereafter denied Petitioners' Motions for Rehearing and Rehearing En Banc.

REASONS FOR DENYING THE WRIT

This Petition raises issues and arguments identical to those presented to the Tenth Circuit. The Petition involves nothing more than the application of fundamental Oklahoma tort law to record facts. Petitioners seek Supreme Court review based upon nothing more than their disagreement with the Tenth Circuit assessment of the record and application of settled law.

The Tenth Circuit's affirmance of judgment n.o.v. on Petitioners' Oklahoma malicious prosecution claim was proper. Uncontroverted evidence established the Company's reliance on counsel as a complete defense and negated an essential element of malicious prosecution. Petitioners' inferences and opinions do not substitute for evidence; there is nothing to warrant further review.

As to the trial court's conditional grant of new trial, Petitioners never even attempt to meet their burden of showing that such was an abuse of discretion.

Petitioners' Oklahoma abuse of process claim was properly dismissed because they never pled any facts establishing that the Company's 1988 conspiracy claim against Petitioners constituted misuse of the judicial process for a purpose unwarranted by the

complaint. Alleged improper motive in filing is entirely insufficient to support their tort claim and the trial court and Tenth Circuit correctly so held.

Each and every argument proffered by Petitioners was fully, fairly and accurately reviewed by the Tenth Circuit. There is no issue of fact or law warranting further review. This Petition should be denied in its entirety.

STATEMENT OF RECORD FACTS

In 1987 and 1988, the Company's Ada Oklahoma plant became the target of serial acts of sabotage.[2] App. 3a, 8a, 11a. At the same time, workers' compensation claims were filed by twenty-five percent of the workforce, an unprecedented figure. Id. Management consulted with counsel specializing in labor matters and disclosed all facts known. App. 3a, 8a, 9a, 12a. Management did not know if it had any legal recourse or who, if any, among its employees might be involved in misconduct. App. 3a, 8a, 9a-10a, 11a-12a.

Management requested the lawyer to conduct an investigation. App. 3a, 12a. Counsel was given full access to Company personnel, records and facilities. App. 3a, 8a, 12a. After on-site investigation and off-site analysis, counsel advised the plant manager that facts disclosed by his investigation warranted the filing of a lawsuit. Id. Counsel identified Petitioners as the

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[2] Due to an impasse in collective bargaining negotiations, the plant's unionized employees, including Petitioners, had worked without a contract since 1984. App. 2a.

individuals to be named as defendants. App. 3a, 8a, 11a-12a. The Company had never singled out these four or suggested that they be targets of investigation. App. 8a, 11a-12a. The trial court found and Tenth Circuit confirmed uncontroverted evidence that, acting in reliance on counsel's conclusions and advice concerning the lawsuit and these Petitioners, the Company filed the 1988 conspiracy suit. App. 3a, 8a, 11a-12a, 16a-17a, 18a.

Petitioners disagree with the trial court and Tenth Circuit, and insist that the Company had specific information that should have alerted it that the lawyers' conclusions regarding these four Petitioners were erroneous. Petition for Certiorari, pp. 10-13, 18-19 (hereinafter cited as "Pet."). The Tenth Circuit fully considered that argument and held that there was no proof of Company notice of exonerating circumstances:

> . . . Mr. Sauer [general manager and decision-maker] did not possess any evidence as to the Appellants, nor did he encourage or suggest these Appellants be named. Mr. Sauer clearly testified his decision to bring the lawsuit against the four Appellants was made in reliance upon the investigation and advice of counsel. No evidence exists in the record to suggest otherwise. . . . Mr. Sauer was entitled to assume Mr. Kruger [the Company's counsel] considered all relevant information in making his recommendation as to the existence of sufficient factual and legal basis to bring

> a lawsuit against these four Appellants. Ideal did not know anything about these Appellants that would have alerted them to a concern as to the propriety of Mr. Kruger's recommendation.

App. 11a-12a (emphasis in original).

Petitioners have pointed to what they consider the Company's "body of knowledge" which they believe should have convinced the Company of their innocence. Pet. 10-13, 18-19. Petitioners' own version of this information contains nothing which would necessarily remove these four from any possible participation in the conspiracy alleged. And, this "body of knowledge" was made fully available to the attorney. App. 3a, 8a, 12a. The Tenth Circuit held that the company was entitled to rely on the attorney's assessment of this information in making his analysis and recommendation to the Company. App. 11a-13a.

There was no evidence to impeach or contradict management's unequivocal testimony that it retained counsel, requested an investigation, and thereafter acted in accord with and in reliance on counsel's advice. App. 3a, 8a, 9a, 11a-12a.

Concerning the abuse of process claim, the Petitioners' complaint alleges that the Company's "improper purpose" in filing the 1988 conspiracy claim was to interfere with legitimate workers' compensation claims and obtain labor concessions. App. 4a-5a, 37a-38a. The trial court pointed out that the legitimacy of the workers' compensation claims and labor tactics were cornerstones of the underlying 1988 conspiracy claim. App. 38a. Such matter, fully within the four

corners of the original complaint, could not be labelled a collateral "improper purpose"; it could not sustain an abuse of process claim. Id. The Tenth Circuit affirmed, citing the body of the case law establishing that alleged ulterior motive in filing suit, even if taken as true, is entirely insufficient to state an Oklahoma abuse of process claim. App. 4a-6a.

By order of November 14, 1991, the Tenth Circuit denied Petitioners' Motions for Rehearing and Rehearing En Banc. This Petition for Certiorari followed.

ARGUMENT

A. JUDGMENT N.O.V. STANDARDS WERE PROPERLY APPLIED.

Petitioners attempt to present a federal question by arguing that Fed.R.Civ.P. 50(b), authorizing judgment n.o.v., denied Petitioners' seventh amendment right to a jury trial. This contention has been explicitly rejected by this Court. Neely v. Eby Constr. Co., 386 U.S. 317, 321, 18 L.Ed.2d 75, 80 (1967), citing Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 85 L.Ed. 147 (1940). Moreover, the Tenth Circuit considered and rejected Petitioners' Seventh Amendment argument. App. 6a-7a. Petitioners' attempt to transform an Oklahoma state law question into a federal constitutional question for purposes of this Petition, must fail.

Under Oklahoma's law of malicious prosecution, reliance on counsel is more than an affirmative defense; such evidence negates the prima facie element

of lack of probable cause. Lewis v. Crystal Gas Company, 532 P.2d 431, 433 (Okla. 1975). Where reliance on counsel is uncontroverted, the malicious prosecution claim fails; judgment for defendant is required based on the plaintiff's failure of proof. Id. See also Williams v. Frey, 78 P.2d 1052 (Okla. 1938).

Federal evidentiary prerequisites governing entry of judgment n.o.v. are settled. Failure of a prima facie element signals failure of the claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L.Ed.2d 265 (1986). Under such circumstances, judgment n.o.v. is required. E.E.O.C. v. Sperry Corp., 852 F.2d 503 (10th Cir. 1988) (plaintiff's theories unsupported by sufficient evidence; trial court erred in denying JNOV). Where uncontroverted evidence establishes an affirmative defense, judgment n.o.v is required. Ford Motor Credit Co. v. Milburn, 615 F.2d 892, 897 (10th Cir. 1980) (trial court erred in refusing JNOV in favor of party with burden of proof); Continental Oil Co. v. Natrona Service, Inc., 588 F.2d 792, 799-800 (10th Cir. 1978) (upholding directed verdict and JNOV for party with burden of proof).

The instant Tenth Circuit decision fully comports with federal judgment n.o.v. standards and governing Oklahoma law. There is no basis whatsoever for further review. This Petition should be summarily rejected in its entirety.

B. TENTH CIRCUIT CONSIDERED AND REJECTED EACH CHALLENGE TO JUDGMENT N.O.V.; THERE IS NO BASIS FOR FURTHER REVIEW.

1. Uncontroverted Evidence Of Reliance Negated Malicious Prosecution; Such Could Not Be Ignored.

The Tenth Circuit held that evidence establishing disclosure of all known facts and good faith reliance on counsel was entirely uncontroverted. App. 9a, 11a-12a, 13a. The instant Petition sets forth nothing more than Petitioners' disagreement with the Tenth Circuit, based upon their own partisan opinions, inferences and speculations. Such are wholly insufficient to overcome the plain uncontroverted evidence. Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 216, 51 S.Ct. 453, 456-457, 75 L.Ed. 983 (1931); Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982) ("an inference is not reasonable if it is 'only a guess or a possibility,' unsupported by evidence").[3]

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[3] This record mirrors Williams v. Frey, 78 P.2d 1052 (Okla. 1938). There, as here, the evidence affirmatively established disclosure of known facts to counsel; and action in accord with counsel's advice. In Williams, plaintiff's inferences and skepticisms proffered to refute reliance were flatly rejected. Id. at 1055.

The significance of uncontroverted, unimpeached evidence is settled law; such must be taken as true:

> [T]his testimony standing uncontradicted, unimpeached, and not discredited by cross-examination must be taken as true.

Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 500 (10th Cir. 1984); see also Stafos v. Missouri Pacific Railroad Co., 367 F.2d 314, 317 (10th Cir. 1966) ("controlling, positive, uncontradicted and unimpeached evidence may not be disregarded even though adduced from interested witnesses; the trier of fact is bound to honor it"); Ford Motor Credit Co. v. Milburn, 615 F.2d 892, 897 (10th Cir. 1980) (uncontradicted, unimpeached testimony required judgment n.o.v.); Selle v. Gibb, 567 F. Supp. 1173 (N.D. Ill. 1983), aff'd, 741 F.2d 896 (7th Cir. 1984) (jury verdict could not be reconciled with uncontradicted and unimpeached defense testimony; judgment n.o.v. required).

The trial court and Tenth Circuit found uncontroverted evidence that Company management disclosed all known facts; gave counsel full access to Company data; and received and relied on counsel's advice. App. 3a, 8a, 9a, 11a-12a, 16a-17a, 18a-19a. These facts constitute good faith reliance, which is a complete defense to malicious prosecution in Oklahoma. Lewis v. Crystal Gas Company, 532 P.2d 431, 433 (Okla. 1975); Thompson v. Inman, 482 P.2d 927, 939 (Okla. 1971); Missouri, Kansas & Oklahoma Coach Lines v Meister, 330 P.2d 579, 582 (Okla. 1958).

In Oklahoma, a party is entitled to rely on counsel because counsel is the "better judge" of

whether known facts warrant litigation. Williams v. Frey, 78 P.2d 1052, 1057 (Okla. 1938). A charging party is fully entitled to rely on counsel's investigation and evaluation of the underlying facts. Herrick v. Devorak, 155 P. 1153, 1154 (Okla. 1916).[4] Under such circumstances, the party is not obliged to undertake its own investigation of the facts, or second guess the attorney's conclusions. Williams, 78 P.2d at 1057.

In full accord with the record and governing Oklahoma tort law and federal j.n.o.v. standards, the trial court and Tenth Circuit held that uncontroverted proof of reliance on counsel disposed of the malicious prosecution claim. Governing authorities and uncontroverted evidence fully support their conclusions. There is no basis whatsoever for further review. The instant Petition should be summarily denied.

2. On-Point Oklahoma Law Establishes The Sufficiency Of The Disclosure Evidence.

Petitioners contend that disclosure to counsel was inadequate because information concerning "these Petitioners" was not assembled and evaluated by the Company. Pet. 20-21. The identical argument was rejected by the trial court and the Tenth Circuit. App. 11a-12a, 16a, 17a-18a.

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[4] See also Missouri, Kansas & Oklahoma Coach Lines v. Meister, 330 P.2d 579, 582 (Okla. 1958) (the charging party secured the personal presence of an attorney and relied on his counsel's investigation; the charging party "did all that could reasonably be expected").

The uncontroverted fact, confirmed by the Tenth Circuit, is that at the time counsel was consulted and directed to investigate, the Company had never identified "these men". Id. The Company had no reason to assemble information particular to them. Counsel had full access to the universe of Company information regarding "these men". App. 3a, 8a, 12a. The Company was entitled to rely on counsel's evaluation of such data, and counsel's opinion that facts warranted litigation against them.[5]

In Oklahoma, the disclosure required for reliance on counsel means "known facts" bearing on the matter at hand. Lewis v. Crystal Gas Co., 532 P.2d 431, 433 (Okla. 1975). Disclosure is satisfied if the reporting party states his knowledge and makes any additional documentary evidence available. Missouri Kansas & Oklahoma Coach Lines v. Meister, 330 P.2d 579, 582 (Okla. 1958).

Oklahoma has considered and refused to impose an affirmative duty of diligent inquiry or investigation on the party relying on counsel. Williams, 78 P.2d at 1057. In Williams, the charging party testified that "I told [counsel] all the circumstances . . . that I knew." 78 P.2d at 1055. That testimony was sufficient to establish full disclosure and support reliance on counsel.

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[5] See also Donaldson v. Miller, 72 P.2d 853, 855 (Idaho 1937) (where independent investigation of counsel is undertaken at request of charging party, the charging party "would not be liable as for malicious prosecution even though the prosecuting attorney's advice was unsound or erroneous. . . . [I]f any mistake was made it was not the mistake of [the charging party]").

Here, the trial court and Tenth Circuit concluded that this record uncontrovertedly established full disclosure of the facts known to management. App. 12a, 18a-19a. Uncontroverted testimony established that these four were never identified by the Company. App. 11a-12a, 16a, 17a-18a. The Company relied on counsel's investigation, conclusions and advice. Id. On the disclosure issue, governing Oklahoma law was correctly applied. There is no basis for further review.

3. There Is No Evidence That The Company Had Reason To Reject The Investigation, Analysis And Advice of Counsel; Petitioners' Inferences And Speculation Do Not Substitute For Evidence.

Petitioners ask this Court to review the Tenth Circuit's "single finding" that the Company "did not know anything about [Petitioners] that would have alerted them to a concern as to the propriety of Mr. Kruger's recommendation." Pet. 17-18. Petitioners point to Company records concerning "these Petitioners" and claim that the Company had reason to know that they were innocent and should not be sued. Pet. 18-19. In fact, the "body of knowledge" recited in this Petition does not contain any exculpatory fact which would constitute notice that the attorney's advice was in error. Moreover, this "body of knowledge" was

made fully available to counsel, and the Company was entitled to rely on counsel's evaluation:

> Mr. Sauer was entitled to assume Mr. Kruger considered all relevant information in making his recommendation as to the existence of sufficient factual and legal basis to bring a lawsuit against these four.

App. 12a. See Lewis, 532 P.2d at 434; Williams, 78 P.2d at 1057.[6] Petitioners' opinionated and speculative disagreement with the Tenth Circuit is no basis whatsoever for further review. This Petition should be denied.

4. Petitioners' "Hostility" Theory Fails To Present A Fact Question.

Additionally, Petitioners argue that Supreme Court review is required because they believe the record establishes the Company and/or its manager were hostile to the workforce. Pet. 22-24. Even if such innuendo could be properly raised, such is wholly insufficient to create a fact question regarding reliance. The Oklahoma Supreme Court's decision in Page v.

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[6] Petitioners argue that the Tenth Circuit decision is error because these was no evidence linking these Petitioners to a sabotage. Pet. 13, 19-20. The contention is meritless; the attorney conducted the investigation, factually identified these Petitioners as participants in a labor conspiracy and advised the Company concerning the legal theories to be asserted. As a matter of Oklahoma law, the Company was entitled to rely on counsel's advice concerning the sufficiency of facts to warrant litigation.

Rose, 546 P.2d 617, 622 (Okla. 1975) is directly on point:

> Assuming that malice entered into [defendants'] actions in this situation or even prompted a vigilance . . . they might not otherwise have undertaken . . . [such] does not establish lack of probable cause.

Id. The Company's reliance on counsel stands uncontroverted. Nothing warrants further review. This Petition should be denied in its entirety.

C. THERE IS NO BASIS TO REVIEW CONDITIONAL GRANT OF A NEW TRIAL; PETITIONERS NEVER ATTEMPTED TO SHOW AN ABUSE OF DISCRETION.

Extreme deference is accorded a trial court's ruling on motion for new trial. Houtz v. General Bonding & Insurance Co., 235 F.2d 591 (10th Cir. 1956) (although judgment n.o.v. reversed, order for a new trial affirmed). Absent a showing of abuse, the trial court's ruling will not be disturbed. Harris v. Quinones, 507 F.2d 533 (10th Cir. 1974); see also Community National Life Ins. Co. v. Parker Square Savings and Loan Assn., 406 F.2d 603, 605 (10th Cir. 1969) ("[t]he trial judge is best equipped to apply the standard enunciated"); Poole v. Leone, 374 F.2d 961, 963 (10th Cir. 1967) ("motion for a new trial is addressed to the sound discretion of the trial court").

The trial court is in the best position to determine whether a jury's verdict is excessive or

influenced by passion or prejudice. Its judgment will be disturbed only if the record manifests a gross abuse. See, e.g., Worsham v. City of Pasadena, 881 F.2d 1336, 1338 (5th Cir. 1989); Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401, 410-411 (8th Cir. 1976); Holmes v. Wack, 464 F.2d 86, 89 (10th Cir. 1972). Here, Petitioners never even attempt to argue the presence of abuse.

Petitioners contend that assessment of damages is the exclusive province of the jury.[7] Petitioners fail to comprehend that the responsibility and duty to set aside the jury's verdict as excessive, the product of passion, and/or against the weight of the evidence, is the exclusive province of the trial court. Whitely v. OKC Corp., 719 F.2d 1051, 1058 (10th Cir. 1983); Holmes v. Wack, 464 F.2d 86, 89 (10th Cir. 1972). Such judicial responsibilities are no invasion of the jury system. Id.

Where the court determines that passion or prejudice influenced the jury, a new trial on all issues is required. Malandris v. Merrill Lynch, Pierce, Fenner & Smith, 703 F.2d 1152, 1168 (10th Cir. 1981) (remittitur not proper; absent judgment n.o.v., a new trial is required).[8] The trial court's finding of passion

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[7] O'Gilvie v. International Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987), provides no authority to overturn the trial court's new trial ruling. In O'Gilvie, there was no trial court finding of excessiveness and no Tenth Circuit application of the abuse of discretion standard.

[8] See Minneapolis St. P. & S.S.M. Ry. Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501 (1931) (no verdict can stand which is, in any degree, the result of passion and prejudice); Wells v. Dallas

or prejudice is afforded great deference; it may be disturbed only upon a showing of abuse of discretion. Worsham v. City of Pasadena, 881 F.2d 1336, 1338 (5th Cir. 1989).

Petitioners never attempt to identify any facts to suggest that the district court's conditional grant of a new trial constituted an abuse of discretion. Petitioners present no legitimate basis for this Court's further review. This Petition should be summarily rejected.

D. THE ABUSE OF PROCESS CLAIM WAS PROPERLY DISMISSED. NOTHING WARRANTS FURTHER REVIEW.

In affirming the dismissal of Petitioners' abuse of process claim, the Tenth Circuit focused on the third element of Oklahoma abuse of process which requires pleading of:

> [s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process . . . .

Independent School District, 793 F.2d 679, 683 (5th Cir. 1986) (remittitur from $1.9 million to $250 thousand insufficient; new trial required); Rosersa v. International Harvester Co., 109 F.R.D. 143, 152 (E.D. Wis. 1986) ("it is unmistakably clear that remittitur may not be employed to cure . . . an excessive verdict that resulted from passion, prejudice, or caprice").

Tulsa Radiology Assoc. v. Hickman, 683 P.2d 537, 539 (Okla. App. 1984), citing Prosser, Handbook of the Law of Torts, § 121 (4th ed. 1971); App. 4a, 37a.

The instant abuse of process claim is grounded on Petitioners' allegation that the 1988 conspiracy case was filed with the objective of "intimidating . . . employees . . . into an abandonment of their legitimate Workers' Compensation claims." App. 5a (emphasis added). The trial court fully recognized that the legitimacy of workers' compensation claims was a pivotal issue in the conspiracy case. App. 38a. Petitioners have never alleged facts to demonstrate that the Company misused the court's process for a purpose unrelated to such conspiracy issues:

> There is no showing that Ideal was using its lawsuit for a coercive purpose to obtain an advantage that was collateral to the lawsuit itself.

Id. (emphasis in original).

Abuse of process requires more than an allegation that the charging party had an ulterior motive in filing the litigation. Lodges 743 and 1746 v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976). In Lodges 743, a union alleged that an employer filed a lawsuit to force the union to withdraw certain unfair labor charges. Id. at 464. The pleading failed to allege "action . . . to utilize the court's process . . . for collateral purposes not related to the suit in question." Id. at 465. Alleged wrongful motive or intent did not render the

litigation an abuse of process; such allegation could not sustain a claim.

In Tulsa Radiology Assoc. v. Hickman, 683 P.2d 537, 539 (Okla. App. 1984) the Oklahoma Court of Appeals reiterated that alleged bad intent does not state an abuse of process claim:

> [T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

Hickman, 683 P.2d at 539, quoting Prosser, Handbook of the Law of Torts, § 121 (4th ed. 1971) (emphasis added). See also Blue Goose Growers, Inc. v. Yuma Groves, Inc., 641 F.2d 695, 697 (9th Cir. 1981) (initiation of lawsuit and pursuit of discovery process based upon ulterior motive insufficient to support abuse of process); Rodriguez v. Carroll, 510 F. Supp. 547, 553 (S.D. Tex. 1981) ("[i]ssuance of process with malicious intent or without probable cause . . . is not actionable").[9]

In Houghton v. Foremost Financial Services Corp., 724 F.2d 112 (10th Cir. 1983), abuse of process was grounded on litigation allegedly undertaken for an illegal purpose entirely remote from the issues framed by the underlying replevin complaint. Here, the

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[9] In Tappan v. Ager, 599 F.2d 376 (10th Cir. 1979), the Tenth Circuit applied Kansas principles identical to Oklahoma abuse of process law and explained that the element of ulterior purpose is satisfactory only if "the ulterior purpose or motive . . . exist[s] outside of the process itself." Id. at 379-80.

"legitimacy" of workers' compensation claims was a cornerstone issue of the underlying action. The Petitioners never alleged any improper motive "collateral" to the original lawsuit.

Here alleged ulterior motive involves legitimacy (or illegitimacy) of workers' compensation claims. Such is inextricably linked to the crux of the underlying case. As such, it is legally insufficient to state an abuse of process claim. The cause of action was properly dismissed.[10] Nothing warrants further review.

The facts governing this abuse of process claim are entirely undisputed. The Tenth Circuit carefully evaluated the body of Oklahoma authorities, and reiterated and applied governing axioms. App. 6a. The Tenth Circuit fully addressed and correctly decided

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[10] Sage Intern. Ltd. v. Cadillac Gage Co., 556 F. Supp. 381 (E.D. Mich. 1982), is on point. There, the ostensible purpose of the underlying lawsuit was to stop unlawful competition. Plaintiff's abuse of process claim alleged that the "ulterior purpose" was to stop all competition, lawful or unlawful. The alleged "ulterior purpose" was inextricably linked to a disputed issue in the original claim; it could not support an abuse of process claim:

> Defendants' ostensible purpose in the [underlying] action was to prevent plaintiffs from competing with defendants through the use of defendants' trade secrets and proprietary information. Defendants' alleged ulterior purpose was to prevent plaintiffs from competing at all. This is not a collateral purpose . . . because such a purpose is indistinguishable from that of the ostensible purpose . . . .

Id. at 389.

this Oklahoma tort law question. There is no fact or circumstance warranting further review. The record and governing authorities mandate that this Petition be denied in its entirety.

CONCLUSION

For all the reasons herein stated based upon dispositive Oklahoma and federal standards, this cause was fully, fairly and accurately decided by the Tenth Circuit Court of Appeals. This Petition raises no compelling issues which would, in any manner, warrant further review. This Petition should be summarily rejected in its entirety.

Respectfully submitted,
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